

1 STATE OF INDIANA)
) SS:
2 COUNTY OF DELAWARE)
3
 IN THE DELAWARE COUNTY SUPERIOR COURT
4
5 CRAIG DUNN and PHILIP WILEY,)
 et al.,)
6 Plaintiffs,)
)
7 -v-) CAUSE NO.
) 18D01-9305-CT-06
8 RJR NABISCO HOLDINGS)
 CORPORATIONS, et al.,)
9 Defendants.)

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11 VOLUME 6
 FEBRUARY 17
12 P.M. Session.
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1 (Out of presence of jury.)
2 MR. CASSELL: All rise.
3 THE COURT: Thank you, be seated.

4 Good morning, Counsel.

5 ALL: Good morning.

6 THE COURT: Plaintiff appears in
7 person by Counsel. All defendants
8 represented this morning?

9 MR. OHLEMEYER: Correct.

10 THE COURT: In terms of argument
11 this morning, my plan is to deal with the
12 motion to permit further discovery.
13 Secondly we'll deal with motions to quash
14 the modified subpoena. Thirdly, motion to
15 exclude prejudicial material from
16 cross-examination. Fourth we'll deal with
17 the issues revolving around the Osdene
18 deposition.

19 And I'm not sure we need to deal with
20 the deposition -- the Colby deposition this
21 morning, but we'll try to deal with those
22 four matters before we bring the jury in.

23 Plaintiff filed their motion for leave
24 from discovery deadline February 13th. The
25 Court's last reviewed that. Defense filed a
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1 response to that motion. Plaintiff have
2 anything in addition to what's contained in
3 the motion?

4 MR. WESTBROOK: Your Honor, Ed
5 Westbrook. We don't at this time.

6 THE COURT: Defendants wish to be
7 heard on the matter?

8 MR. OHLEMEYER: Your Honor, I think
9 the only other thing I need to bring to the
10 Court's attention, and you may be aware of
11 this, the law firm of Chadbourne & Parke has
12 filed a motion that is related to this.

13 THE COURT: I saw that.

14 MR. OHLEMEYER: That I don't think
15 you need to deal with on the motion to open
16 discovery, but you'll have to deal with at
17 the point if and when you get past this and
18 we talk about the subpoena itself.

19 THE COURT: Plaintiffs have
20 requested leave to conduct further discovery
21 regarding Minnesota sanction documents
22 Court's reviewed their motion, Court has
23 reviewed defendants' response thereto.
24 Court finds the motion of the plaintiffs
25 will be sustained. I'll issue an order to
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1 that effect, Counsel.

2 Defendants have filed a motion to quash
3 a modified subpoena. As you know, we
4 discussed this matter Friday afternoon. The
5 subpoena was to be modified. The gist of
6 the defendants' motion seems to be that even
7 the modified version is too broad.

8 Mr. Ohlemeyer.

9 MR. OHLEMEYER: Your Honor. In
10 light of the generous amount of time that
11 this Court has permitted for discovery in
12 this case, and in light of the fact that
13 you've allowed them to supposedly narrow the
14 subpoena, the fact that they have now come

15 in and asked for more than what they told
16 you they wanted on Friday is some indication
17 of why and how this has nothing to do with
18 this lawsuit. This subpoena as currently
19 drafted will involve the Court in a
20 protracted discussion of privilege. It will
21 require the Court to hear from non-parties
22 to the case. It will require the Court to
23 essentially conduct a document-by-document
24 review of anything that might be
25 appropriately discoverable under the

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1 subpoena. And quite frankly, it has nothing
2 to do with this lawsuit.

3 If the plaintiffs' subpoena is allowed
4 to stand, then the defendants to this case
5 will respond with an appropriate privilege
6 log. There are non-parties to the case who
7 want to be heard on the issue, and we will
8 embark upon a procedure whereby we will do
9 everything except finish the trial of this
10 case over the next three weeks. These are
11 all issues that are collateral to this case.
12 These are documents upon which claims of
13 privilege have been and appropriately
14 asserted, and the subpoena that has been put
15 before Your Honor is substantially broader
16 than what the plaintiffs asked you for on
17 Friday. And for those reasons, Your Honor,
18 I think, and for the reasons set forth in
19 the brief, I think it ought to be quashed.

20 In addition to that, I don't represent
21 Chadbourne & Parke. They have Counsel here.
22 I assume they want to be heard on that. And
23 I would ask the Court, if you're inclined to
24 hear from them, John Wilkes from the firm of
25 Blackburn & Green from Fort Wayne is here on

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1 their behalf. And as you know, they have
2 filed a brief on that.

3 THE COURT: Thank you, Counselor.
4 Mr. Wilkes here?

5 MR. WILKES: Yes, Your Honor.

6 THE COURT: Mr. Wilkes, do you care
7 to be heard on this issue?

8 MR. WILKES: For the record, Your
9 Honor, my name is John Wilkes from the firm
10 of Blackburn & Green in Fort Wayne. I have
11 only entered my appearance in order to file
12 a motion to admit Mr. William Snipes of the
13 firm Sullivan & Cromwell from New York City,
14 who would like to be admitted for the
15 purpose of making argument on this issue.

16 THE COURT: All right, Counselor.
17 Is he here?

18 MR. WILKES: He is.

19 THE COURT: Good morning,
20 Counselor.

21 MR. SNIPES: Good morning, Judge.

22 THE COURT: Let me make sure that I
23 saw the motion for your admission here.
24 Mr. Wilkes has moved the admission of
25 Mr. Snipes of Sullivan & Cromwell for

1 purposes of this case. The Court will
2 sustain that motion. You are William
3 Snipes?

4 MR. SNIPES: Yes, Judge.

5 THE COURT: You're from Sullivan &
6 Cromwell of in New York?

7 MR. SNIPES: That's correct.

8 THE COURT: And you represent
9 Chadbourne & Parke, Counselor?

10 MR. SNIPES: Yes, I do, Judge.

11 THE COURT: Be glad to hear any
12 comment you might like to make.

13 MR. SNIPES: Thank you, Judge. I
14 know you have a trial going and I'll try to
15 be as brief as possible. I am here for one
16 reason, and one reason only. And that is
17 because the breadth of the subpoena served
18 by Mr. Motley and his team of lawyers
19 purports to reach not simply out of the
20 state of Indiana, but out of the state of
21 Indiana to New York, and out of New York by
22 extension to the United Kingdom.

23 Now, I say that because the subpoena by
24 its terms demands that Chadbourne & Parke
25 produce documents that is in its possession

1 belonging to a Chadbourne client that's in
2 the United Kingdom and that's Gallahers. I
3 think you've heard something about Gallahers
4 on Friday. I read the transcript.

5 I'll just tell you this by way of
6 background, Judge. Two things. Two things.
7 I want you to understand who Gallahers is
8 and who Chadbourne is. I want you to
9 understand that there is something else in
10 play here. There is a proceeding pending
11 today in New York. It's scheduled to be
12 argued on the 4th of March. It involves a
13 lot of papers. Here is what we put in,
14 including what the other side put in.

15 If you're going to get to this, Judge,
16 I have to give you these papers because
17 these papers brief very important issues of
18 law concerning the Hajlhate convention.
19 I've got to talk a little about that. The
20 hate convention comes into play because
21 Gallahers is a United Kingdom company.
22 They're over in the U.K.. They're not in
23 the U. S. They're a cigarette manufacturer
24 for sure. They've never sold a single
25 cigarette in the United States. They've got

1 no marketing or advertising, nothing here.
2 Their only connection to the United States
3 is Chadbourne & Parke. Chadbourne
4 represents them and has so for a number of
5 years, but it represents them in connection
6 with litigation that's pending in the United
7 Kingdom.

8 The relevancy of that, Judge, is that
9 what the subpoena purports to do is to reach
10 across the pond over into the United Kingdom

11 and effectively make Gallahers produce
12 documents in this proceeding.

13 I say that -- I say there is a
14 proceeding in New York. We've made a motion
15 in connection with that proceeding to quash
16 a subpoena that purports to do the same
17 thing. There are a lot of reasons it's
18 inappropriate, and I think they all lead
19 back to the same conclusion. You can't do
20 that because the Court lacks jurisdiction
21 over that non-party.

22 Now, in this case it's even further
23 removed. Mr. Sheffler shows up,
24 Mr. Sheffler is a partner to Chadbourne &
25 Parke. He represents one of the defendants.

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1 He comes to court -- well, whether he comes
2 to court or not, he comes to this state to
3 help in the representation of his client.
4 He's at a restaurant, a plaintiff lawyer
5 walks over and hands him a subpoena. Sure.
6 Mr. Sheffler is here and for some purposes
7 the Court has jurisdiction over him. And
8 I'll tell you, Judge, just so that you know,
9 the jurisdiction you have over Mr. Sheffler
10 is jurisdiction you do not have over me.

11 And that is, if I do something, if I
12 flip out here, you surely have the authority
13 to hold me in contempt. What my presence
14 here doesn't do, what Mr. Sheffler's
15 presence here couldn't do is give this
16 Court, this State, jurisdiction over
17 Chadbourne such that it can compel
18 Chadbourne to produce documents in
19 connection with this action.

20 Now, you know, if there is a legitimate
21 discovery that needs to be in this case,
22 there are ways to do that. If there is
23 legitimate discovery from Gallahers that
24 needs to be in this case, there is a treaty.
25 It's called the Hague convention. And what

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1 you do is, you come to Your Honor and you
2 say Judge, we need discovery of Gallahers,
3 they've got relevant documents. I've got a
4 commission here. Give me, Judge, authority
5 to go into the United Kingdom and get those
6 documents and you go to the United Kingdom
7 and the Courts there will hear you or they
8 won't.

9 What you can't do, and I hope in my
10 brief, Judge, that you find it compelling,
11 because, frankly, I do. There's a long line
12 of constitutional cases which says you can't
13 do that. It's extraterritorial. You have
14 the jurisdiction and authority over things
15 and persons in your presence.

16 And I say this, Judge, and I don't want
17 to get too excited about it. The subpoena
18 is flawed from start to finish, and there
19 are -- you know, it is so bad, the Courts
20 have crafted a number of documents to try to
21 deal with it. But the basic principle is

22 this: We cite a case that says to enforce a
23 subpoena duces tecum you've got to have
24 jurisdiction. Well, how do you get
25 jurisdiction over the person that you're

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1 trying to compel to produce the documents?
2 You get the jurisdiction by virtue of that
3 law firm being in state. Well, that's easy.
4 Or that law firm doing business in the state
5 and your long arm statute reaches them.
6 It's just pure, simple constitutional
7 analysis. Well, some courts have said we
8 want to up you on that.

9 There are two other documents on that.
10 Fiduciary shield and immunity. And what
11 they try to do is protect the proceeding.
12 So then I'm not here. That's what they try
13 and do.

14 It's when a lawyer comes into the state
15 to represent -- in his representative
16 capacity, the lawyer is not subject to
17 jurisdiction. He's coming there on behalf
18 of his clients and they call that fiduciary
19 shield. And there are lots of cases that
20 have applied that to all kind of people,
21 including lawyers.

22 There's a document called the immunity
23 document which essentially says the same
24 thing. When a witness or lawyer comes into
25 court, they are free -- that comes into your

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1 state, they are free from service.

2 Now, it makes sense, Judge, because if
3 Mr. Motley shows up this morning and I hand
4 him a subpoena, and then you've got to deal
5 with that subpoena, and someone of the other
6 defendants' lawyers hands him a subpoena,
7 you've got to deal with that subpoena, for
8 documents, for that lawyer's testimony, it's
9 disruptive of the process, putting aside the
10 fact that it is totally unfair.

11 Now, so I'm suggesting to you, Judge,
12 that because the subpoena is defective, we
13 can stop, full stop right here. If you want
14 to go further, then we've got to talk about
15 the Hague convention, because I think this
16 is a serious front to the Hague convention,
17 and we've got to talk about fundamental
18 claims of attorney-client privilege.

19 To know that a privilege is involved,
20 all you have to do is look at the subpoena.
21 The subpoena says Chadbourne produced
22 documents in your possession concerning your
23 client.

24 Now, I'm not going to tell you that
25 every piece of paper at Chadbourne & Parke

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1 is privileged. But I am going to tell you
2 that the documents that this subpoena
3 reaches concerning Gallahers -- and I'm not
4 addressing the other parts of it, the other
5 companies listed in the subpoenas, as I
6 understand it, are defendants here. They've

7 got lawyers, and they'll address that.

8 The impropriety here is attempting to
9 subpoena documents belonging to a non-party,
10 that is not in the state, not in the
11 country. And that's the problem. And
12 that's why we need protection.

13 Now, if you're forcing me to, Judge,
14 I'll make a motion to supplement the record,
15 because if you're going to get beyond this
16 jurisdictional defect and address the
17 privilege claims, then you need the
18 submission that we made in New York. And
19 I'm telling you you don't have to do that,
20 because we've put these cases in -- we've
21 put this material before a New York judge
22 because another party is seeking to get
23 access to Gallahers' documents from the U.K.
24 That's going to be argued very soon, and
25 it's going to be decided and it will be

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1 resolved. And if that subpoena is valid and
2 the documents are produced, then there is
3 nothing to talk about.

4 But if you're going to address that, I
5 need to supplement the record and
6 demonstrate, as I believe these papers do,
7 why those documents, putting aside whether
8 or not the subpoena is defective, why those
9 documents are privileged.

10 Now, I don't want to take up all your
11 time and go on and on and on about why
12 they're privileged, but they're privileged
13 because they were created by the client for
14 the lawyer to help with litigation.

15 So I'm sure on this table here they've
16 got some documents just like that. Their
17 client may have helped them put together
18 some documents to help the lawyer prepare
19 for the case. That's a no brainer. You
20 can't get those.

21 The others are documents that preexist.
22 You know, let's say these companies have
23 100,000 documents, I don't know, but you
24 take two or three documents and you give it
25 to your lawyer and your lawyer does an

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1 analysis. Now, that document is not
2 privileged, but if you go in the lawyer's
3 files and get it, you're communicating what
4 the lawyer was doing. Go to the -- and
5 that's why the rules, virtually every rule
6 tells you you've got to go to the client and
7 you've got to go there in the right way.

8 I've taken up too much of your time,
9 Judge.

10 THE COURT: Counsel, we may get
11 back on the other issue, but I wanted to
12 hear your thoughts initially. Thank you.

13 MR. WILKES: Should I submit the
14 New York submission?

15 THE COURT: Let me hear the initial
16 comments from the plaintiffs and then let's
17 see where we are.

18 MR. WILKES: Okay. Thank you,
19 Judge.
20 THE COURT: Thank you, Counselor.
21 MR. WESTBROOK: Your Honor, Ms.
22 Ritter from our office will address this.
23 THE COURT: All right.
24 MS. RITTER: Good morning, Your
25 Honor.

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1 THE COURT: Good morning.
2 MS. RITTER: First of all, much of
3 that argument was a rehash of either what
4 was argued by Mr. Ohlemeyer last week or by
5 what was argued by the various parents in
6 their attempts to get out of this case. And
7 so I'm not going to go back into all of
8 those details. Many of the arguments that
9 he's made are, though, essentially the same
10 arguments that the holding companies have
11 made.

12 The reason we're here where we are, as
13 we indicated last week, and in our
14 submission to the Court, is that we
15 requested documents from the defendants in
16 this case, American and Brown & Williamson,
17 and their parent, from American and from
18 Brown & Williamson, American's successor,
19 and from the companies' parents, and we did
20 not receive the documents that we are now
21 attempting to get.

22 We subsequently on the -- after this
23 trial was already going on, learned of the
24 existence of very germane and telling
25 documents that bear directly on the issues

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1 in this case. And we are faced with a
2 situation where this defendant has directly
3 avoided discovery that would have been
4 relevant to the case.

5 Obviously, if we had known about the
6 documents, we could have listed the
7 documents and we wouldn't be here. The
8 whole point is that we didn't know about the
9 documents because of all of their attempts
10 to hide the documents either through their
11 law firms or in foreign countries.

12 I only had a brief opportunity as he
13 was speaking to read his papers, having not
14 received a copy of it over the weekend, and
15 was taken by the fact that there was no
16 explanation herein of the relationship
17 between Gallahers and American. There is a
18 relationship. The relationship between
19 Gallahers and American is similar to another
20 successor holding company situation where
21 American Brands owned American Tobacco and
22 additionally owned Gallahers.

23 Chadbourne & Parke, as we explained
24 last week, and was set forth in the
25 Minnesota order that's been attached to our

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1 papers, also represented each of these
2 companies in tobacco litigation.

3 We don't know what's in all of the
4 documents. We do know what's in a couple of
5 the documents that have been required to be
6 produced in the state of Minnesota case.

7 There are two groups of documents that
8 we're here about. One group is the group
9 that is already here in the United States up
10 in Minnesota subject to that court's
11 jurisdiction in Minnesota.

12 THE COURT: Which is what
13 Mr. Motley asked permission to do Friday.

14 MS. RITTER: That's right.

15 THE COURT: Now, do you have a copy
16 of your attachment to the subpoena?

17 MS. RITTER: I do. And while the
18 words make it sound like it's quite broad,
19 what we are trying to get is those documents
20 which the Court has required them to turn
21 over. When the defendant made their
22 argument on Friday, they then indicated that
23 they are still preserving their objections
24 to those documents, and that they have done
25 so in numerous court papers.

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1 So what we've attempted here to do is
2 to, in addition to the documents that we are
3 requesting, if they intend to withhold
4 documents, claiming privilege and claiming
5 that it's still subject to this court case
6 up the New York, we want to get the
7 pleadings and the materials that they have
8 filed in that case so that we can more
9 quickly get to this Court's attention, to
10 Your Honor's attention what the remaining
11 dispute would be.

12 For example, a good bit of what we've
13 asked here, No. 4, is probably in the brown
14 folder that Mr. Snipes was talking about.
15 We've asked for the affidavits that they
16 submitted in connection with those document
17 disputes up in the case of Minnesota case.
18 I imagine that's what's in the folders.
19 That would be No. 4 and No. 5.

20 Because we don't know what the
21 documents are, I have to confess there was
22 some difficulty in trying to decide what to
23 way in this attachment. We thought they
24 understood from the Court's - from the
25 record that was made what we're wanting to

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1 get are those documents that the court in
2 Minnesota has, after several weeks now of
3 dispute, should have been produced, are
4 available and under the control of this
5 defendant and are, in fact, in the process
6 of being produced in Minnesota. And that's
7 what we want to get those documents.

8 Mr. Sheffler is a partner in that law
9 firm, there is a reference in their papers
10 to some fact witness recognizing
11 Mr. Sheffler. That's absolutely incorrect.
12 Several of us know Mr. Sheffler, have been
13 at various depositions of him.

14 It was a coincidence that we got the
15 leaked document from Minnesota that bears
16 directly on this case. It is a confession
17 that Gallahers, the relative of American
18 Tobacco, and now Brown & Williamson,
19 admitted in 1970 that smoking causes cancer
20 in humans. Having seen that document and
21 knowing that Chadbourne & Parke was in the
22 middle of this who could have the documents
23 and were the plaintiffs in Minnesota going
24 to get the documents, we wanted to try and
25 get to the crux of the matter and thought

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1 that having a Chadbourne & Parke person
2 available to provide insight into things
3 such as the Brown folder might be helpful in
4 us trying to get these delinquent and
5 withheld, apparently, relevant documents.

6 And we apologize if this still seems
7 overbroad, but it's those things that the
8 Court is making them turn over, part of
9 which has already turned -- they've turned
10 over, that we want. And to the extent that
11 they are going to withhold from even this
12 Court those materials, and we are in the
13 position of having to try to further
14 litigate this here, we would have liked to
15 have been able to see the papers that have
16 been filed by the parties in the New York
17 proceeding, including affidavits, so that we
18 could expedite our preparation for dealing
19 with that issue here in this court.

20 On the subject of whether attorneys can
21 be subpoenaed and can be fact witnesses, we
22 do think that Mr. Sheffler, as a member of
23 the law firm of Chadbourne & Parke, was
24 uniquely possessed with information that
25 would have otherwise been unavailable and

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1 believe that Indiana law did support the
2 subpoena as the Court found last week.

3 That's all I would add at this point,
4 Your Honor. We did honestly just see their
5 brief. So if there is any reason to, we
6 could address some of the issues and try to
7 fill in some of the gaps of the relationship
8 between Gallahers and American.

9 American is in this case. American
10 Brand was in this case. Brown & Williamson
11 is in this case. And BAT is in this case.
12 And Gallahers is not a stranger to those
13 companies. Gallahers was owned by American
14 Brand, Gallahers participated in many of the
15 industry-wide organizations that have been
16 put in issue and are participants in the
17 conspiracy that the plaintiffs will prove
18 exist in this case. And to act as if they
19 are some foreign innocent company that just
20 happened to coincidentally be represented by
21 Chadbourne & Parke is really not very
22 accurate, and we could provide additional
23 information if the Court requires. Thank
24 you.

25 THE COURT: Thank you, Counselor.
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1 Mr. Ohlemeyer.

2 MR. OHLEMEYER: Very briefly in
3 response, Your Honor, and again, we're
4 hearing some very serious charges that no
5 one has put before you any evidence to
6 support. As the Court remembers, discovery
7 against BAT was stayed in this case pending
8 resolution of the jurisdictional issues.
9 You resolved the jurisdictional issues, no
10 one asked to conduct any further discovery
11 against BAT. There has been the suggestion
12 that this information that they're trying to
13 obtain right now was requested in this case
14 but not produced.

15 Your Honor, I really think that's quite
16 a gross misstatement, if not an absolute
17 untruth. No one has put a discovery request
18 before Your Honor that says we, the
19 plaintiffs, ask for information which would
20 encompass these documents.

21 It is undisputed that American Tobacco
22 Company produced 65 boxes of documents and a
23 privilege log that sat in Mr. Shockley's
24 office unopened despite the fact that
25 plaintiffs' Counsel were notified of the
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1 fact that those documents were available for
2 inspection. It is undisputed that the Ness
3 Motley law firm asked for these specific
4 documents, and they did it very
5 specifically, as early as January 21st, in a
6 case in Oklahoma in which they're involved.
7 It is undisputed that they asked for the
8 same 1100 documents on January 22, in a
9 letter the Ness Motley firm wrote to Counsel
10 for Brown & Williamson.

11 So, Your Honor, all of this is to say
12 that this subpoena is not a proper discovery
13 effort in this case. What the plaintiffs'
14 lawyers are trying to do here is to get you
15 to decide something on short notice and
16 without development of an accurate record
17 that is being litigated in other cases in
18 which they are involved in other states, and
19 I don't think the Court should allow this
20 kind of subpoena to be issued and to be
21 served and to be enforced in an effort to
22 circumvent the process and procedure of
23 other courts and to involve this court in a
24 procedure that is not what the law of
25 Indiana would require the Court to do if
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1 they had served a request, we had responded
2 with a privilege log, and then the Court was
3 required to debate the issue of privilege on
4 a document-by-document basis.

5 So for those reasons, Your Honor, I
6 think the subpoena could be quashed and
7 should be quashed.

8 MS. RITTER: Your Honor, if I might
9 just add one thing briefly on this

10 connection of what we did request?
11 THE COURT: Go ahead.
12 MS. RITTER: We provided to the
13 Court the specific requests where we were
14 asking the defendants, and all their
15 predecessors, sisters and children to
16 produce documents relevant to the issues of
17 smoking and health, product testing, safer
18 cigarettes. We attached those requests.
19 From what we saw in the document leaked that
20 week, that document clearly seemed to be
21 pertinent. We certainly had no way of
22 knowing that 1100 documents that we thought
23 we were after have now turned out to be
24 these same documents. I'm not sure that
25 that will even turn out to be correct. But

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1 since we don't know what they are, we
2 certainly at this point have no way of
3 knowing.

4 And as for these 65 boxes, they are
5 correct that 65 boxes were produced by
6 American Tobacco three weeks before the
7 close of discovery in this case. And based
8 on their own feelings in the state of
9 Minnesota, the documents that we are talking
10 about now are not in those 65 boxes or on
11 the privilege logs that would have been
12 provided with those boxes. And their
13 filings in the state of Minnesota that the
14 defendants have indicated that, in fact,
15 those documents, these Gallahers documents,
16 the Gallahers set, has not ever been
17 produced up to the point of this dispute in
18 Minnesota and has not been included on
19 privilege logs. So to keep throwing up
20 these 65 boxes is somewhat of a red herring.
21 And it doesn't really get to the point of
22 these documents. We could have looked
23 through them, we could have spent three
24 weeks looking through 65 boxes and we still
25 wouldn't have had these documents and we

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1 still wouldn't have known of the
2 significance of the discovery in the
3 Minnesota case if the Court up there hadn't
4 come upon through the mechanism of 100,000,
5 \$200,000 fines for the withholding of this
6 material. And that's what we're now at this
7 point trying to get at.

8 Thank you, Your Honor.

9 THE COURT: Thank you. Mr. Snipes.

10 MR. SNIPES: Judge, the only thing
11 that Chadbourne is in the middle of is a
12 discovery dispute between the plaintiff and
13 the defendant. And my only point, Judge, is
14 the plaintiffs can't obtain discovery from
15 the defendants by getting it from one of
16 their law firms.

17 Now, unless the allegation -- and there
18 are lots of allegations. There were
19 allegations made this morning and there are
20 allegations made in the transcript for which

21 I've seen -- I've seen affidavits from
22 people who know that disproves that.
23 Unless, Judge, someone is saying that B&W
24 doesn't have the documents that the
25 plaintiff wants and that Chadbourne doesn't,

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1 they're not saying that. They're saying
2 Mr. Sheffler was just conveniently available
3 so we served the subpoena on him because we
4 know that his law firm represents the
5 parties and he might have the documents.

6 Well, that's beside the point. The
7 subpoena ought to have been served on the
8 parties and the difference between
9 Chadbourne and Gallahers and the parties in
10 this litigation is precisely that. They're
11 not parties. And the way to obtain
12 discovery from a non-party is not by serving
13 a subpoena on that non-party's lawyer.

14 Now, what they're getting you into,
15 Judge, is to authorize an illegal subpoena.
16 The subpoena is invalid, and that is hardly
17 an open case.

18 Now, I hate to say this, but I
19 represent a law firm, and one of my -- one
20 of my law firm -- my client is a lawyer in
21 this case, but I don't really care about
22 that. I don't care about what discovery
23 goes on between the parties.

24 What I'm telling you, Judge, is that
25 you can't take discovery from Chadbourne &

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1 Parke this way because it's illegal, and
2 that's the simple fact, and you can't get
3 discovery from Gallahers this way because
4 they're not here and there is a way to do
5 that. And all I'm saying is you've opened
6 discovery for these guys; if they really
7 need discovery from Gallahers, I suppose
8 there is a way to do that. But what they're
9 asking you to do with this is not what they
10 told you they would do on Friday. That is
11 clear. Just look at -- I read the
12 transcript. I wasn't here. In fact, Judge,
13 I learned about this at 4:00 on Friday, and
14 I spent the weekend preparing these papers
15 to come and to tell you, Judge, what I'm
16 telling you, and that is that the subpoena
17 is unlawful.

18 And the other stuff they're talking
19 about, frankly, I don't care whether it's
20 right or wrong. I'm just telling Your Honor
21 that it's not right. It's inappropriate to
22 drag the law firm into this. You know, I
23 don't want to lecture about it, but that's
24 my point.

25 What I heard, and I don't know the

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1 parties so I don't know the lady's name, I
2 heard her say there is some history about
3 the Chadbourne documents. Judge, this file
4 here are papers that were filed in court.
5 All you do to get these is you go to the

6 Clerk of Courts and you say I want to see
7 the papers that were submitted. There is no
8 secrets in here. Nothing in here is under
9 file. I'm not hiding anything. She said
10 what's in Mr. Snipes' folders. Here it is.
11 Here it is. There. I gave it to them. I'm
12 going to file a copy with the Court.

13 Judge, what I'm saying is those are
14 documents which I think, the Court
15 pleadings, which I think demonstrate that
16 you cannot take discovery from a non-party
17 through its lawyers and a document
18 demonstrating an affidavit from a British
19 barrister. Remember I told you, Gallahers
20 is over in the U.S. It does business in the
21 U.K. It happens to have a U.S. lawyer.
22 Well, that's no surprise. It's no surprise
23 that Gallahers would turn to Chadbourne
24 because Chadbourne has represented some of
25 these defendants.

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1 But the litigation that they're
2 representing Gallahers in is in the U.K., so
3 it's no surprise, this British barrister
4 would tell you, Judge, under United Kingdom
5 law which, after all, this is sort of where
6 much of our common law derived from, under
7 U.K. law, that the U.K. client is entitled
8 to a privilege. And we've told the judge in
9 New York that.

10 But since I've given the stuff to the
11 plaintiffs because they seem so desperate to
12 say that Chadbourne is in a conspiracy, and
13 Mr. Snipes has got the documents in his
14 pocket, and the defendants are always in
15 that position. The defendants say, Judge,
16 these documents are privileged, we can't
17 give them to them. Well, the plaintiffs
18 say, Judge, those are documents of a
19 conspiracy. And their mere fact in not
20 giving them to you, Judge, proves that there
21 is something in them. Well, they've got
22 them. Now I'm going to give you a copy,
23 Judge, and all I'm going to say is you've
24 got to quash the subpoena.

25 MS. RITTER: Your Honor, if I could
1699

1 just one --

2 THE COURT: Let him finish,
3 Counselor.

4 MS. RITTER: I thought he finished.

5 MR. SNIPES: What this is, Judge,
6 as I've said, is telling you what the
7 documents are. That's the full submission
8 in New York.

9 THE COURT: Are these copies of the
10 discovery responses made in Minnesota,
11 Counselor?

12 MR. SNIPES: No, Judge. They're
13 copies of Chadbourne & Parke's motion in New
14 York court to quash a subpoena directing
15 that Chadbourne produce documents in its
16 files concerning its U.K. client.

17 THE COURT: All right. I just want
18 to be clear about that.

19 MR. OHLEMEYER: Your Honor, in
20 response to your question, the 1100
21 documents we're talking about were on a
22 privilege log that was submitted to court
23 and Counsel in Minnesota that the Ness
24 Motley firm had in their possession before
25 the start of this trial. Some of the

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1 documents on that privilege log, not all of
2 them, some of them are actually on the
3 privilege log that was made available in
4 this case but not reviewed.

5 THE COURT: If you have those in
6 Minnesota, why do I need to order those
7 again, Counsel?

8 MS. RITTER: Your Honor, I don't
9 need the actual -- what I need is the
10 affidavits that were apparently submitted
11 with some of the responses under seal.
12 There were materials submitted by Brown &
13 Williamson on behalf of, I guess its
14 predecessor, American, under seal. It's
15 those materials that I actually need. They
16 were attached when the Court got it. And
17 when the plaintiff there got it to the
18 responses to the discovery request, we do
19 not have access to that material that was
20 filed under seal. That's what we need.
21 It's affidavits that were submitted.

22 THE COURT: Isn't that an issue
23 that should be addressed to Minnesota?

24 MS. RITTER: If it was --

25 THE COURT: Your firm has the

1701

1 documents, or at least they've been filed in
2 a case in which your firm is involved.

3 MS. RITTER: Your Honor, we are not
4 involved in the case in Minnesota. That's a
5 state case that is going on to trial Ness
6 Motley has never been involved in any
7 representation of the plaintiff in that
8 case. And the only way we get materials in
9 the state of Minnesota case is if, a, the
10 defendants provide us separately what
11 they've provided in Minnesota or if we can
12 get them from the Court's file in Minnesota,
13 and we cannot get the materials that are
14 filed under seal. That's why certain
15 documents had been produced in Minnesota
16 that are part of this dispute that we never
17 could get until the Judge, right before they
18 were used with the witness or an opening
19 statement, lifted the seal.

20 That's how the one that we used last
21 week, the 1970 documents, became available.
22 So there are still things in Minnesota,
23 unfortunately, under seal and that court, as
24 I understand it, is attempting to address as
25 it can.

1702

1 On the question of who is Gallahers.

2 In this lawsuit we sued American Tobacco and
3 American Brands. In their own papers,
4 Chadbourne & Parke has indicated that
5 American Brands owned Gallahers. Gallahers
6 was spun off from American Brand in May of
7 1997. We did request all materials from
8 American Brands, American and Brown &
9 Williamson relating to any of its
10 subsidiaries and related entities throughout
11 the years that are at issue in this case.
12 So to say that somehow Gallahers' stuff has
13 never been involved in this case is
14 incorrect.

15 It's a misunderstanding, perhaps, and
16 Mr. Snipes has just come into the case, of
17 the facts, that the parents and the holding
18 companies are in this case. And American
19 Brand is and American Brand did own
20 Gallahers.

21 THE COURT: Do you have a copy of
22 the subpoena?

23 MS. RITTER: Yes, Your Honor, I do.

24 THE COURT: Look at paragraph 1.
25 Copies of discovery responses. Now, tell me
1703

1 what you want Mr. Sheffler to do in response
2 to this subpoena as it relates to paragraph
3 1.

4 MS. RITTER: Provide anything that
5 was submitted in the case in Minnesota under
6 seal.

7 THE COURT: Since the first of the
8 year. That's what Mr. Motley said.

9 MS. RITTER: Yes, Your Honor.

10 THE COURT: That would be about
11 1100 documents.

12 MS. RITTER: And any written
13 affidavits that they submitted under seal
14 addressing any of the -- I don't know for a
15 fact that the actual 1100 documents have
16 been turned over in Minnesota. But if they
17 have, then yes, the 1100 documents. For any
18 documents that have yet to be turned over in
19 Minnesota that Gallahers may still be
20 holding or Chadbourne & Parke may still be
21 holding, then --

22 THE COURT: That's not what
23 Mr. Motley asked for. He asked for anything
24 that had actually been filed in Minnesota.

25 MS. RITTER: In Minnesota, then
1704

1 yes, Your Honor, simply if the 1100 are all
2 in Minnesota, that's what we want is the
3 1100 documents.

4 THE COURT: All right. That was a
5 request made Friday. I've considered the
6 motion to quash over the weekend. I knew
7 there was going to be an argument. The
8 attachment to the subpoena is in six
9 paragraphs, and that is overly broad. There
10 is no question about that, that it requests
11 more than was requested Friday.

12 The only thing that I think is

13 appropriate is paragraph 1, which the Court
14 will strike paragraphs 2 through 6 of the
15 attachment and the subpoena will apply as it
16 relates to those items filed in the state of
17 Minnesota after the first of the year and
18 referred to in paragraph 1.

19 I'm going to permit those items to be
20 filed under seal. We will deal with any
21 privilege issue at a later point.

22 MS. RITTER: Thank you, Your Honor.

23 MR. SNIPES: Your Honor, just to be
24 clear, you're talking about the 1,114
25 documents; right?

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1 THE COURT: Yes, sir. That's all
2 I'm talking about at this point, Counselor,
3 and I'm going to permit those to be filed
4 under seal.

5 MR. OHLEMEYER: Filed? I'm
6 confused, Your Honor. Filed with you or
7 given to the plaintiffs' lawyers?

8 THE COURT: Actually at this point
9 I will have them filed with the Court in
10 response to the subpoena. Then we'll deal
11 with any privilege issues.

12 MR. OHLEMEYER: Do you want briefs
13 on the privilege issues in connection with
14 the filing, or do you want --

15 THE COURT: Mr. Snipes, do you
16 intend to be here if there is an argument,
17 where there is an argument on the privilege
18 issue?

19 MR. SNIPES: Judge, as to your
20 order, Brown & Williamson, I believe, will
21 address those issues, not Chadbourne,
22 because Chadbourne doesn't really have any
23 interest in that.

24 THE COURT: I appreciate that.
25 Thank you, Counselor.

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1 MR. SNIPES: Thank you.

2 THE COURT: So there is no
3 confusion, Mr. Sheffler will be in
4 compliance if these documents are filed with
5 the Court under seal. Then I'll determine
6 if and when they should be released. That
7 concludes the matter on the motion to quash.

8 Plaintiffs' filed a motion to exclude
9 prejudicial or relevant testimony regarding
10 expected cross-examination from Mr., is it
11 Wigand?

12 MS. RITTER: Wigand, Your Honor.

13 THE COURT: Any comment on that?

14 Actually this is in the nature of a
15 motion in limine. The defendants are
16 correct. It is past the time for the filing
17 of the motion in limine, but any comment on
18 your motion?

19 MS. RITTER: Yes, Your Honor. Your
20 Honor, the plaintiff will withdraw its
21 motion which was filed more as an
22 anticipatory objection to what we would
23 believe clearly prejudicial questioning of

24 the witness, and would simply request that
25 Your Honor require that if these

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1 materials -- if this type of questioning is
2 anticipated, that defense Counsel at that
3 point in time, while the witness is on the
4 stand, perhaps, request a brief side bar so
5 that we could remind Your Honor or tell Your
6 Honor at that time of what our concerns are
7 concerning the irrelevance and prejudicial
8 nature of that questioning.

9 But we are happy to withdraw the
10 motion. It really is simply we are
11 concerned about the possibilities not having
12 been involved with many of these Counsel in
13 the past of a blurt out of something that
14 would be just prejudicial and inappropriate
15 so we'll withdraw the motion.

16 THE COURT: I haven't noticed
17 anything. All right. Plaintiffs' motion to
18 exclude prejudicial testimony in
19 anticipation of cross-examination is
20 withdrawn.

21 Plaintiffs on Friday filed a packet
22 regarding the Osdene deposition. I did
23 receive defendants' motion in opposition to
24 that, and essentially asking that that not
25 be admitted into evidence.

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1 Mr. Ohlemeyer, any comment on your
2 motion?

3 MR. OHLEMEYER: Very briefly, Your
4 Honor. And --

5 THE COURT: Let me stop you before
6 you begin. Let's talk, first of all, about
7 what effect the Texas order will have on my
8 decision.

9 MR. OHLEMEYER: Well, I think, Your
10 Honor, that procedurally if the plaintiffs'
11 lawyers want to use this deposition in this
12 case they need to go to Texas and get an
13 order from that judge unsealing the
14 deposition for use in this case. Why and
15 how the judge makes that decision is not
16 something, obviously, I can predict, but I
17 think it's an issue of procedure that needs
18 to be addressed with Judge Folsom in the
19 first instance.

20 But more importantly, Your Honor, I
21 think, as you'll recall, by court order we
22 were required to identify deposition
23 transcripts that were to be used in this
24 trial, and the plaintiffs were very broad
25 and very comprehensive in giving us 120 some

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1 pages of individuals and specific
2 depositions with specific pages and specific
3 lines. This deposition of Dr. Osdene
4 appears nowhere on that pleading that was
5 filed on January 23 with the Court. They
6 identify depositions of Dr. Osdene taken in
7 the Chipallone (phonetic) case when he was
8 an employee of Philip Morris, but nowhere do

9 they identify a deposition taken in the
10 state of Texas case which was taken after
11 Dr. Osdene retired from the company.

12 So procedurally I think this evidence
13 should not be put before the jury, and
14 substantively, Your Honor, I don't want to
15 repeat everything that was described in our
16 motion, because I think it's well written,
17 quite frankly, and comprehensive.

18 The fact of the matter is there is no
19 probative value that outweighs any
20 prejudicial effect on this type of testimony
21 in this type of case on the issues that are
22 to be decided here and for those reasons,
23 Your Honor, we would ask the Court to grant
24 our motion.

25 THE COURT: Thank you, Counselor.

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1 For the plaintiff?

2 MR. WESTBROOK: Yes, Your Honor,
3 with your permission, Ed Westbrook.

4 THE COURT: Mr. Westbrook, is he
5 correct this was not included in your
6 designation?

7 MR. WESTBROOK: Yes, Your Honor, he
8 is correct, in the blizzard of paperwork
9 going back and forth, this deposition, which
10 is no surprise to anyone, was not included.
11 It's been -- since it was taken in May of
12 1997 last summer, it's been the Osdene
13 deposition. But he is correct that in this
14 100 something pages those pages got omitted.
15 How it happened, I don't know how it
16 happened, but he is correct that that
17 happened, Your Honor.

18 But as to the issue of prejudice, Your
19 Honor, I just want to supplement that to say
20 that we did do the 48-hour disclosure
21 pursuant to Your Honor's rule I think on
22 February 9th that it was I wrote to
23 Mr. Ohlemeyer saying we would use our
24 previously designated excerpts from Osdene,
25 Spears and Colby, and on the next day we

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1 sent over and specifically said plaintiffs
2 intend to use previously disclosed excerpts
3 from the videotape deposition of Dr. Thomas
4 Osdene, taken in the state of Texas vs. the
5 American Tobacco Company.

6 Frankly, Your Honor, we did not realize
7 until it was raised by the defendants that
8 those pages had been omitted from the very
9 large designation. And it is a 113-page
10 designation of various depositions. But he
11 is correct as to that fact, Your Honor.

12 THE COURT: Let's talk about the
13 other issue. You have a Texas court,
14 district court in Texas which has ordered
15 this deposition sealed. The point here is
16 that should you not have an order from the
17 Texas court releasing that? Or concealing
18 that?

19 MR. WESTBROOK: Your Honor, I think

20 there are two points that answer that
21 satisfactorily. First, the text -- three
22 points.

23 First, Judge Folsom's procedure in
24 Texas was when anyone asked, he released it.
25 He released it to Florida, released it to
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1 Mississippi, released it to Minnesota. So I
2 think we have a course of conduct.

3 Number two.

4 THE COURT: Did you ask here?

5 MR. WESTBROOK: No. Your Honor,
6 the case is over down there.

7 Number two, Judge Folsom, perhaps, has
8 no jurisdiction on that issue.

9 But number three, and perhaps
10 dispositive, is that in the agreement
11 winding up the case, the parties agree, the
12 defendants agreed with the State that we
13 were free to seek leave of other courts in
14 other actions to have previously
15 confidential and sealed material released.
16 And I have a copy of those pages from the
17 comprehensive settlement agreement and
18 release which was in the big packet that we
19 supplied, I believe, to the Court, but it
20 may very well have been buried in there.

21 With your permission, Your Honor, I
22 would hand that up to you. I have another
23 copy for the defendants.

24 THE COURT: Thank you.

25 MR. WESTBROOK: Your Honor, I've
1713

1 handed you the cover, pages 23 and 24 of the
2 comprehensive agreement and release in the
3 Texas case. And in paragraph 22, which
4 begins on page 23, it's headed
5 "Non-admissibility," and the portion that is
6 of relevance here, Your Honor, is the
7 carryover, in fact, the sentence that begins
8 on page 24 that ends up the paragraph:
9 Thereafter, any party to the action may make
10 any motion with respect to such discovery
11 materials. Then we get to the important
12 part, provided, however, that nothing in
13 this paragraph 22 shall preclude undersigned
14 Counsel from seeking disclosure of such
15 materials in other actions or settling
16 defendants from agreeing otherwise in any
17 other action.

18 Your Honor, that provision, I think,
19 has a clear purpose. That is Judge Folsom
20 at some point I think, and rightfully so,
21 would want to wash his hands of matters in
22 closed cases. At the same time, the
23 plaintiffs in Texas, and we were Counsel for
24 the plaintiffs, among others, certainly did
25 not want to see information disclosed in
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1 Texas die in Texas. That would be contrary
2 to the efficiency of the judicial
3 procedures, it would be contrary to getting
4 at the truth, which is what we want to get

5 at. So under that provision, clearly, Your
6 Honor, I think we have the right to come to
7 Your Honor and ask that this Osdene
8 deposition, which has been released, was
9 released by Judge Folsom to everyone who
10 asked and also I think we have an order that
11 we provided to the Court with the Minnesota
12 judge just the other week, February 4th. He
13 unsealed the Osdene deposition taken in that
14 case and it's my information that it was
15 read or is perhaps to be read this week in
16 Minnesota.

17 So very shortly any concerns about
18 embarrassment, et cetera, because of
19 Dr. Osdene taking the Fifth Amendment have
20 been or will be obviated.

21 So, Your Honor, for that reason I think
22 that it is proper and appropriate for us to
23 come to Your Honor and ask that the Osdene
24 deposition, which I understand may even be
25 on the Internet, could be read in this

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1 court. And Your Honor, I'll address the
2 substance if you want to get to it past the
3 procedures.

4 THE COURT: No. I'm talking
5 procedure now.

6 Mr. Ohlemeyer, anything else?

7 MR. OHLEMEYER: On procedure, Your
8 Honor, as you know those cases which
9 Mr. Westbrook told you about are cases
10 involving states suing tobacco companies.
11 The issues are much broader in this case.
12 And the fact that that case is over doesn't
13 change the fact that the deposition is still
14 sealed. And I think, procedurally, I don't
15 think the Court should be as cavalier as
16 plaintiffs' Counsel are suggesting about
17 these pretrial deadlines.

18 We spent a lot of time and a lot of
19 effort and a lot of our clients' money,
20 quite frankly, asking the Court and
21 receiving from the Court deadlines so that
22 this case could proceed orderly and
23 efficiently and not so that we would be here
24 every day, you know, into jury time arguing
25 about things that could or couldn't have

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1 been on exhibit lists.

2 And for those reasons, Your Honor,
3 procedurally, I think the evidence isn't
4 proper in this case and substantively, as
5 I've said under Rule 403, there can be no
6 probative value in this case of Dr. Osdene's
7 invocation of the Fifth Amendment due to
8 ongoing criminal proceedings which Your
9 Honor have already ruled are matters not to
10 be addressed in the case.

11 MR. WESTBROOK: Your Honor, if I
12 could just say a few brief things.

13 THE COURT: Go ahead.

14 MR. WESTBROOK: First as to Judge
15 Folsom's intentions, Judge Folsom approved

16 this settlement agreement with that
17 provision, thereby he has approved us going
18 to other courts seeking the Osdene and other
19 materials being released.

20 And second, Your Honor, we certainly
21 are not being cavalier about deadlines with
22 the Court. Your Honor, in a case of this
23 magnitude, this was a page that simply got
24 overlooked. It was not cavalier. We filed
25 a very large designation and we certainly

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1 weren't trying to slip one over on anybody,
2 as I think defense counsel certainly
3 recognizes, the Osdene deposition is an
4 important matter and through inadvertence
5 the pages weren't given but there is no
6 surprise.

7 THE COURT: Procedurally,
8 Mr. Ohlemeyer is correct. What I have here
9 is a federal district judge with an order
10 sealing a deposition and I have nothing that
11 indicates that he himself has unsealed that,
12 so at this point we don't need to discuss
13 the substantive matters raised in the
14 motion. The motion will be tentatively
15 sustained to exclude the testimony, the
16 deposition testimony unless and until I
17 receive an order unsealing this.

18 All right. I think that's all we
19 needed to deal with this morning before we
20 brought the jury in. Who will be your first
21 witness for the plaintiff?

22 MR. HOWARD: Ralph Oden, Your
23 Honor.

24 THE COURT: All right.

25 MR. WAGNER: Judge, if that's their

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1 first witness, and I am anticipating, but I
2 believe that this is another cumulative
3 witness that's going to testify as to Mrs.
4 Wiley and her trades and matters that have
5 already been testified to at this point by
6 Gary Wiley, Mrs. Addington, and Philip
7 Wiley. And unless -- from what I know about
8 Ralph Oden, I don't believe there is going
9 to be anything other than that. And I would
10 object to any cumulative testimony along
11 those lines at this point.

12 THE COURT: Who is he, Counselor?

13 MR. HOWARD: That's Mildred Wiley's
14 brother, Your Honor.

15 THE COURT: All right. What's the
16 purpose of his testimony?

17 MR. HOWARD: He's going to talk
18 about Mildred's life before, mostly before
19 she met Philip Wiley until she was a student
20 in school, growing up.

21 THE COURT: And this is probative
22 as to what?

23 MR. HOWARD: To fill in what her
24 life was like and that she never smoked and
25 was not around smoking.

1719

1 We also, Your Honor, anticipate asking
2 Mr. Oden some information about what his
3 knowledge was about the risk, health risk
4 associated with smoking prior to 1991.

5 MR. WAGNER: Of course, Your Honor,
6 that's irrelevant again as to what a
7 witness' knowledge was. He is not Mildred
8 Wiley or someone who might know what her
9 knowledge was. And I believe Counsel's
10 description of the testimony that he intends
11 to elicit from this witness is, indeed,
12 cumulative.

13 THE COURT: Well, a part of it,
14 perhaps, could be. What about the relevancy
15 question on -- you want to prove what he
16 knew about smoking?

17 MR. HOWARD: Your Honor, I think we
18 might as well maybe get at this right now
19 because we ran into the problem last Friday.

20 In their contentions they contend that
21 Mildred Wiley was well-educated, medical
22 professional, stayed current, she believed
23 that exposure was harmful to her health.
24 Also they contend that Mildred Wiley was at
25 all times relevant, times aware of alleged

1720

1 health risk associated with ETS. They stood
2 up and told this jury in opening statement,
3 so let's wrap this up that you're going to
4 hear in this case the risks associated with
5 smoking have been well known and common
6 knowledge for a long time.

7 Throughout their opening statement,
8 they are showing their intent that they're
9 going to try this case that Mildred Wiley
10 had common knowledge that everyone else did
11 that secondhand smoke could kill you. That
12 it was harmful, that it had health risks
13 associated with it. That that was common
14 knowledge. It's all through their opening
15 statement. It's through their contentions.

16 So it's very relevant as to what people
17 knew, everyone that gets on that witness
18 stand, if it's common knowledge, then that
19 person, especially nurses and all of that
20 that kept abreast and Ralph Oden, who is a
21 minister and well educated and who read the
22 periodicals, that we certainly should be
23 able to stand up and ask those people did
24 you take the Reader's Digest, did you stay
25 abreast of health risks and what was your

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1 knowledge in 1991. Because Mildred Wiley
2 isn't here. We can't call her to refute
3 that.

4 So the only opportunity we have to
5 refute their contentions to bring it for
6 what they're basically saying is that she
7 had this knowledge and, even though she knew
8 it was going to kill her, she made a choice.
9 And it gets back to their choice. She made
10 a choice, and we should have the right to
11 show that that was not an informed choice,

12 that she did not have that common knowledge
13 because no one else had it because the
14 tobacco companies were hiding it and it
15 wasn't common knowledge at the time she was
16 exposed to their dangerous and defective
17 product. So it goes back to the choice
18 matter and common knowledge.

19 And, Judge, it's several places in
20 their opening statement they have maintained
21 that it's common knowledge and the whole
22 world knows it. So it's not irrelevant. It
23 goes to the very issue that we're talking
24 about because, in order for anyone to make a
25 choice as to whether or not she should work

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1 in another hospital or leave her occupation
2 because there was this smoke around that was
3 going to kill her and she knew she had the
4 knowledge that it was going to kill her. So
5 it is very relevant to -- for this jury to
6 know through witnesses that take that stand
7 as to what their knowledge was to refute
8 this idea that there was common knowledge.

9 THE COURT: Mr. Ohlemeyer.

10 MR. OHLEMEYER: The plaintiffs have
11 to prove, Your Honor, that cigarettes are
12 defective and unreasonably dangerous. To
13 prove that they have to show they are more
14 dangerous than contemplated by the ordinary
15 consumer. That is an objective standard.
16 The cases are very clear on that.

17 We have a witness who may testify as to
18 what was common knowledge in the community.
19 They have a couple of witnesses who purport
20 to have information, expert witnesses, about
21 historically what was common knowledge, what
22 was known and what was unknown. The
23 subjective knowledge of a specific
24 individual is not probative of that issue.
25 And lacks the evidentiary foundation that

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1 Your Honor needs to or should require to
2 have it admitted in this case.

3 What Mr. Oden may or may not have known
4 isn't the issue. The issue is what was the
5 ordinary consumer's knowledge, which is an
6 objective standard. And then the question
7 perhaps on current risk or some other
8 defense dealings specifically with Mrs.
9 Wiley. And Mr. Howard is right.
10 Unfortunately, Mrs. Wiley isn't here to tell
11 us that. But we have testimony from her
12 husband about what he knew and what they did
13 and their behavior from which the jury can
14 infer things. You can't infer what Mrs.
15 Wiley knew from what Mr. Oden or somebody
16 else knows.

17 THE COURT: Mr. Cross.

18 MR. CROSS: Thank you, Your Honor.
19 I appreciate the opportunity to be heard.
20 This issue is going to come up on a number
21 of times today, because of some of the
22 witnesses who are going to be presented. I

23 would just like to point out that there is
24 really two dimensions of -- that this kind
25 of evidence takes, and I think Mr. Ohlemeyer

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1 tends to confuse them.

2 As Mr. Howard indicated, they did all
3 through their opening statement, and in
4 their contentions raise the issue that Mrs.
5 Wiley should have known better, that she
6 worked there voluntarily when there was this
7 risk of secondhand smoke that was painfully
8 obvious to everyone by reason of common
9 knowledge.

10 I think this particular excerpt is
11 particularly emphatical on this point. This
12 is from Mr. Ohlemeyer's opening statement on
13 page 495 of the Richardson transcript. "And
14 that is the world that Mrs. Wiley and
15 Mr. Wiley grew up in. It's a world where
16 they chose not to smoke, they chose not to
17 associate with smokers, they didn't spend a
18 lot of time with people who smoked. They
19 did that by choice. They read and they
20 heard and they believed the things that were
21 written about cigarettes and cigarette
22 smoking. Mrs. Wiley learned about them as a
23 nurse. Her training as a nurse, no doubt,
24 taught her about the health risks associated
25 with smoking. She taught her children about

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1 the health risks associated with smoking.
2 You'll hear she read magazines and
3 newspapers during time periods and even some
4 medical journals during time periods where
5 articles were published about ETS and
6 whether or not it was a risk to health. At
7 the time she started working at the VA, Mrs.
8 Wiley was aware of and believed that there
9 might be risks to her health as a result of
10 exposure to other people's tobacco smoke."

11 Now, in that context or in those
12 passages, the defendants were telling this
13 jury that Mrs. Wiley should have known
14 better.

15 Now, at the same time elsewhere in
16 their opening statement they said, page 543,
17 "You're going to hear in this case the risks
18 associated with smoking have been well known
19 and common knowledge for a long time.
20 Everybody knew that, not just Mrs. Wiley."

21 So that's the two dimensions. What
22 Mrs. Wiley knew and what everybody knew.
23 And I think it's -- on this record
24 Mr. Oden -- Mrs. Wiley isn't here. We can't
25 ask her what she knew. We can't ask her why

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1 she stayed in the job at the VA if she knew
2 that secondhand smoke was possibly going to
3 end her life. We can't ask her that. But
4 we can ask her relatives. We can ask
5 Mr. Oden what he knows about the extent of
6 knowledge that Mrs. Wiley had.

7 And that, I believe, is what Mr. Howard

8 is going to try and elicit from that
9 witness. That is relevant. No one else can
10 say what Mrs. Wiley might have known except
11 the people who knew her. Those are lay
12 opinions which we should be able to at least
13 explore the basis of the knowledge.

14 THE COURT: That's not precisely
15 what Mr. Howard indicated he was hoping to
16 elicit from the witness.

17 MR. CROSS: I can't speak -- my
18 understanding of what his testimony was was
19 what he knew that Mrs. Wiley knew through
20 what she had been exposed to those.

21 MR. WAGNER: I distinctly heard
22 Mr. Howard say --

23 THE COURT: Go ahead, Mr. Wagner.

24 MR. WAGNER: I heard Mr. Howard say
25 he intended to elicit from Mr. Oden what

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1 Mr. Oden knew.

2 THE COURT: That's what he said.

3 MR. WAGNER: That's what he said.

4 And it's quite simple, it seems to me, Your
5 Honor, that nothing that Mr. Cross is
6 telling the Court is going to be furthered
7 by asking a witness what he knew.

8 Because -- in the first place, Mr. Oden is
9 her brother. As I understand it, he was a
10 minister for many years. He wasn't there in
11 the VA Hospital or whatever. And so what he
12 knew or didn't know doesn't go to anything
13 that Mr. Cross is talking about.

14 MR. HOWARD: Your Honor, I did say
15 that I'm going to do that. They're trying
16 to show that Mildred Wiley knew secondhand
17 smoke was dangerous and could kill her but
18 how did they know that? Because she's a
19 nurse and she kept up on periodicals. You
20 heard them ask the question. She read
21 Reader's Digest and she did this and did
22 that. And from that we're going to get an
23 inference. And then they bring in these
24 exotic articles, wherever they might appear,
25 and drawing an inference of that, the fact

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1 that she kept abreast of medical issues,
2 we're going to infer from that that she had
3 that knowledge that that smoke was going to
4 kill her and she went ahead and decided,
5 made a choice to work there anyway.

6 Certainly it should be probative. And
7 even though it's cumulative, it's cumulative
8 if the witnesses get up there and say -- we
9 certainly should be able to ask a witness
10 who has knowledge or has the same level of
11 education, a nurse, her brother who is a
12 minister and has a college degree, and ask
13 him do you read periodicals, do you keep
14 abreast of health issues, and did you know
15 before 1991? Certainly we should be
16 entitled to draw that inference from a
17 number of witnesses that come up there.

18 THE COURT: I disagree. What

19 Mr. Oden may have known 10 years ago, 20
20 years ago has no bearing on this matter.
21 Now, you may be able to get testimony
22 as to -- well, I'm not going to say that.
23 In any case, if there is an objection, if
24 you would, to that, I'll sustain the
25 objection as to what he may have known.

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1 I will bring the jury in in five
2 minutes.

3 (A brief recess was taken.)

4 MR. CASSELL: All rise.

5 THE COURT: Be seated. Good
6 morning, ladies and gentlemen.

7 ALL: Good morning.

8 THE COURT: Jury appears in its
9 entirety, together with all the three
10 alternates. We are ready for the next
11 witness for the plaintiff, Mr. Howard.

12 MR. HOWARD: Thank you, Your Honor.

13 Good morning, ladies and gentlemen.

14 Plaintiffs would call Ralph Oden.

15 THE COURT: All right. Raise your
16 right hand, sir.

17 PLAINTIFFS' WITNESS, RALPH ODEN, SWORN

18 THE COURT: Would you have a seat
19 right over there. Tell the jury your name.

20 THE WITNESS: My name is Ralph
21 Oden.

22 THE COURT: Spell your last name.

23 THE WITNESS: O-D-E-N.

24 THE COURT: Thank you.

25 DIRECT EXAMINATION

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1 BY MR. HOWARD:

2 Q Mr. Oden, where do you live?

3 A [DELETED].

4 Q And how long have you lived there?

5 A Nearly four years.

6 Q And what is your occupation?

7 A I'm semi-retired from ministry.

8 Q And what church are you associated or
9 affiliated with?

10 A The Brookhaven Wesleyan Church of Marion,
11 Indiana.

12 Q I'm going to take you back and ask you what
13 year you were born, Mr. Oden.

14 A 1932.

15 Q And your parents' name?

16 A Charles and Ethel Oden.

17 Q And where were you born?

18 A Hong Kong, China.

19 Q And did I ask you the year, 19- --

20 A 1932.

21 Q How long did you live in Hong Kong?

22 A Approximately five years -- three years.

23 Q And do you have any brothers and sisters?

24 A My sister -- my brother is in the
25 Philippines.

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1 Q And how old is your brother?

2 A She's five years younger than I.

3 Q And then you have a sister?

4 A Yes, she's deceased. Mildred.
5 Q Mildred?
6 A Mildred Wiley.
7 Q When you came back to Hong Kong, how old
8 were you at that time, Mr. Oden, when you
9 left Hong Kong?
10 A I was not quite three.
11 Q And where did you move to then?
12 A Mother and dad moved shortly to Ohio -- to
13 Indiana about in 1935, I think, or '36.
14 Q And then did the whole family live here in
15 Indiana, come back to Indiana?
16 A Yes, for a short time.
17 Q And that included Mildred?
18 A Uh-hum.
19 Q And then where did the family move?
20 A We moved to Ohio. My dad took a pastorate
21 in Ohio.
22 Q Was your mother a minister also?
23 A Yes. Yes.
24 Q And how long did you stay -- did the family
25 stay in Ohio?

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1 A One year.
2 Q And then where did the family, your family
3 go to?
4 A We moved to Kentucky.
5 Q And --
6 A Dad pastored there.
7 Q How long did you stay in Kentucky?
8 A 17 years. I wasn't there the whole time.
9 Q When did you leave Kentucky?
10 A I was 14 when I left.
11 Q Where did you go?
12 A I went to Frankfort, Indiana.
13 Q Where did you go to Frankfort, Indiana?
14 A We had a college there and a high school,
15 and I took my high school and college.
16 Q What was the name of it?
17 A Frankfort Pilgrim College.
18 Q Is it still there?
19 A No. It's gone long time ago.
20 Q Did Mildred later follow you there to
21 Pilgrim High School?
22 A Yes.
23 Q And you would have been two years ahead of
24 her in school?
25 A Yes.

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1 Q During that period of time did you see
2 Mildred on a regular basis?
3 A Oh, yes.
4 Q And how long did you stay there at Pilgrim
5 High School -- did you go to college there
6 also?
7 A Uh-hum.
8 Q So how long did you stay there in Frankfort
9 going to college?
10 A I graduated in 1956.
11 Q And was Mildred still there when you left?
12 A No. She left in '55.
13 Q And do you know what she did after -- did
14 she graduate from Pilgrim High School?

15 A Yes. And she took her nurse's training at
16 Lafayette.
17 Q Did you become acquainted with Philip Wiley
18 about that time?
19 A Yes. Well, I knew him for several years.
20 Q Were you in school with Philip Wiley?
21 A Yes.
22 Q And after they married and left there for
23 the remaining years, how often would you see
24 Mildred?
25 A Probably three or four times a year, the
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1 family, the various families.
2 Q And after you left college there, you never
3 lived in the same town that Mildred lived
4 in; is that correct?
5 A That's correct.
6 Q Did you ever know Mildred to smoke a
7 cigarette?
8 A No.
9 Q Reverend Oden, did you ever smoke a
10 cigarette?
11 A Couple, three times.
12 Q And how old were you then?
13 A Probably ten. Ten or 11 years of age or
14 less. I'm not sure. Maybe nine or ten, I
15 suppose. My sister caught me smoking and
16 went in and told my mom, and my mom got me
17 down and prayed and promise I would never do
18 it again and I haven't.
19 Q Never smoked since then?
20 A No, sir.
21 Q Did you ever have conversations with Mildred
22 about what she thought about the health
23 effects of smoke?
24 MR. WAGNER: Your Honor, object.
25 This would all be hearsay.

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1 THE COURT: He can answer that yes
2 or no.
3 Q Did you have any conversations with her
4 about what she knew or what knowledge she
5 had about the health risk associated with
6 smoking?
7 A No.
8 Q Reverend Oden, in your ministry through the
9 years, did you have occasion to go into
10 hospitals?
11 A Yes, I did.
12 Q And did you have an opportunity to observe
13 in those hospitals -- let me strike that.
14 What reason would you go into the
15 hospital?
16 MR. WAGNER: Well, Your Honor, I'll
17 object to this. This is all irrelevant as
18 to what reasons this witness would go into
19 other hospitals.
20 THE COURT: Sustained.
21 Q When you would go into other hospitals,
22 Reverend Oden, would you notice if people
23 were smoking in those hospitals?
24 MR. WAGNER: Same objection, Your
25 Honor, it's irrelevant and immaterial to any

1 issues in this case. It's not related to
2 any of the facts or issues in this case.

3 THE COURT: Objection is sustained.

4 Q Reverend Oden, have you ever read newspapers
5 on a regular basis?

6 A Yes.

7 Q Do you take any periodicals or any
8 magazines?

9 A Yes.

10 Q Can you tell the jury some magazines that
11 you take and read?

12 MR. WAGNER: Your Honor, I may be
13 anticipating here, but again, this is
14 irrelevant to any of the issues in this case
15 as to what this witness may have read, what
16 articles he may have read, what periodicals
17 he subscribed to, what newspapers he may
18 have received. It's all irrelevant to any
19 of the issues in this case.

20 THE COURT: Sounds like it is,
21 Counselor, unless this somehow relates to
22 Mrs. Wiley.

23 Q Reverend Oden, did you ever have any
24 discussions with Mildred Wiley about the
25 health risks associated with environmental

1 tobacco smoke?

2 MR. WAGNER: Judge, I'm going to
3 object. This is the same question that
4 Counselor asked just a minute ago.

5 THE COURT: I think he asked that
6 question and he answered no.

7 MR. HOWARD: I'll take that, Judge,
8 thank you.

9 Q Did you ever go to the VA Hospital and visit
10 Mildred?

11 A I stopped one time or two to see her.

12 Q Reverend Oden, from what you observed about
13 your sister, Mildred Wiley, do you know if
14 she had any knowledge of health risks
15 associated with secondhand smoke?

16 MR. WAGNER: No foundation,
17 speculation, Your Honor.

18 THE COURT: Sustained.

19 Q Reverend Oden, have you observed throughout
20 your -- as far as you know, that Mildred
21 never smoked; is that correct?

22 A That's correct.

23 Q And you knew that she worked at the VA
24 Hospital?

25 A Yes.

1 Q And did you know if there was smoking in
2 that hospital?

3 A Yes.

4 MR. WAGNER: Your Honor, objection,
5 no foundation.

6 THE COURT: The last question was
7 does he know whether or not there was
8 smoking in the hospital?

9 MR. HOWARD: Yes.

10 THE COURT: He can answer that.

11 A Yes.
12 Q From what you observed of your sister
13 working in a smoking condition, did you
14 observe that she did not have the knowledge
15 that secondhand smoke -- of the health risks
16 associated with her working there?
17 MR. WAGNER: Well, Your Honor --
18 MR. HOWARD: Yes or no.
19 MR. WAGNER: -- it's speculation.
20 There is no foundation.
21 THE COURT: Rephrase that.
22 Q From what you observed of your sister
23 working in a hospital where there was
24 smoking, do you know whether or not she had
25 knowledge about the health risks associated

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1 with secondhand smoke?
2 MR. WAGNER: Well, Judge, there is
3 no foundation laid this witness could read
4 the mind of his sister based upon those kind
5 of foundational facts. It's all
6 speculation.
7 THE COURT: Sustained.
8 MR. HOWARD: No further questions.
9 THE COURT: Mr. Wagner.
10 MR. WAGNER: Defense has no
11 questions, Your Honor.
12 THE COURT: Thank you, sir. Call
13 your next, Mr. Howard.
14 MR. WAGNER: Who is the next
15 witness?
16 MR. HOWARD: Betty Jeffrey.
17 MR. WAGNER: Max, to save time, can
18 I take a look at your --
19 MR. HOWARD: No problem.
20 THE COURT: Good morning, ma'am.
21 THE WITNESS: Good morning.
22 THE COURT: Would you raise your
23 right hand.
24
25

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1 PLAINTIFFS' WITNESS, ROBERTA JEFFREY, SWORN
2 THE COURT: Have a seat right over
3 there, please. Would you tell us your name.
4 THE WITNESS: My name is Roberta
5 Jeffrey. I've always been called Betty.
6 THE COURT: All right. Would you
7 spell your last name for us.
8 THE WITNESS: J-E-F-F-R-E-Y.
9 THE COURT: Thank you.
10 DIRECT EXAMINATION
11 BY MR. HOWARD:
12 Q Are you doing okay?
13 A Uh-hum.
14 Q Ms. Jeffrey, where do you live?
15 A Pardon me?
16 Q Where do you live?
17 A I live [DELETED]
18
19 Q How long have you lived there?
20 A 72 years.
21 Q Are you employed?

22 A No. I'm retired.
23 Q Where did you retire from?
24 A The VA Hospital in Marion.
25 Q How long did you work at the VA Hospital in
1741
1 Marion?
2 A I began August 19th of '73, and retired
3 November 26th, '97.
4 Q I want to find out a little bit about what
5 you did there at the VA and what kind of
6 employment. Can you tell the jury, let's
7 just start with your first job, your first
8 assignment, the type of job it was and what
9 building you went to work in, if you
10 remember.
11 A I trained on 138-2, which was a nursing home
12 care unit, and I was there for eight or nine
13 months, and then they assigned me to 138-4.
14 Q What kind of a job did you have,
15 Ms. Jeffrey?
16 A I was a ward secretary.
17 Q And is that known -- do you have any
18 other --
19 A When I started it was called a ward clerk.
20 They now call them medical clerks.
21 Q So ward clerk, ward secretary, medical
22 clerk, all the same?
23 A Right.
24 Q Basically is that the job, same type of job
25 you had throughout the time that you were at
1742
1 the VA?
2 A Yes.
3 Q Did you ever work in Building 16?
4 A Yes.
5 Q Can you tell the jury when that would have
6 been that you worked in Building 16?
7 A I was assigned there, I forget the exact
8 date the first time, and I was there for two
9 years. And then I went back after being
10 assigned to other buildings and was there
11 for 16 continuous years. That's where I
12 retired from.
13 Q And that would have been from '81-'97?
14 A '81 to '97.
15 Q Did you work on 16A or 16B?
16 A Both. I was assigned to both wards.
17 Q Now, let's explain a little bit to the jury
18 Building 16 is how many stories?
19 A It's three stories.
20 Q Did they have patients on all three floors?
21 A They did when I first started there.
22 Q And then did there come a time when they
23 didn't have on all three?
24 A No. Now there is just patients on two
25 floors.
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1 Q Two floors, and which floors would that be?
2 A 16A and 16B.
3 Q When you went to 16, I think you said your
4 second time around in Building 16 was in --
5 started again in 1981, did they just have
6 the two floors there at the time?

7 A Yes.
8 Q Mrs. Jeffrey, I'm going to show you what has
9 been marked as Plaintiffs' Exhibit 19-2A and
10 ask you if you can identify what that shows
11 or what that is.
12 A This area here --
13 Q Wait a minute. Just tell us in general what
14 this is, what this drawing is.
15 A These are patient rooms down here. Is that
16 what you mean?
17 Q Is this a floor plan of 16A?
18 A Yes.
19 Q And you've seen that before?
20 A Not this exact one, but I've seen several
21 similar.
22 Q Okay.
23 MR. WAGNER: Can we approach for a
24 second, Your Honor?
25 THE COURT: All right.

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1 (Bench discussion.)
2 THE COURT: Are you going to offer
3 that, Counselor?
4 MR. HOWARD: Yes.
5 THE COURT: Any objection to that?
6 MR. WAGNER: Could I just ask a
7 couple of preliminary questions, Your Honor?
8 THE COURT: Go ahead, Mr. Wagner.
9 PRELIMINARY QUESTIONS BY MR. WAGNER:
10 Q Ms. Jeffrey, you didn't create this drawing,
11 I take it?
12 A No.
13 Q Do you know who did?
14 A Probably architects. I don't know.
15 Q You don't know who created the drawing.
16 Have you compared the drawing -- you
17 mentioned you had seen other drawings of the
18 building.
19 A I don't understand.
20 Q I thought I heard you say -- and perhaps I'm
21 wrong -- that you had seen other drawings
22 like this one.
23 A No. I've seen similar drawings where,
24 before they remodeled the building.
25 Q Would it be fair to say, Ms. Jeffrey, that

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1 you don't really know what's on this exhibit
2 as being 100 percent accurate as to what it
3 is supposed to depict?
4 A I would say it's very accurate.
5 Q Have you looked it over before you took the
6 witness stand?
7 A Yes.
8 Q So you have looked it over and it looks
9 accurate to you?
10 A Pardon me?
11 Q So you have looked it over and it looks
12 accurate to you; is that right?
13 A Yes.
14 MR. WAGNER: I don't have any
15 further objection.
16 THE COURT: Any objection to the
17 offer, Mr. Wagner?

18 MR. WAGNER: I have no further
19 objections, Your Honor.
20 THE COURT: Mr. Ohlemeyer?
21 MR. OHLEMEYER: No, Your Honor.
22 THE COURT: Plaintiffs 19-2A will
23 be admitted.
24 (Plaintiffs' Exhibit(s) 19-2A received
25 in evidence.)

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1 BY MR. HOWARD:
2 Q Mrs. Jeffrey, you also testified that you
3 worked on the 16th floor, 16B. I mean 16B,
4 the next floor up. Before I show you this,
5 to eliminate any confusion, is what I have
6 here -- did I show you this drawing and you
7 just never seen it in this form before; is
8 that the problem?
9 A That's the old one.
10 Q Okay. This is a copy of what we had blown
11 up and put on to this.
12 A Okay.
13 Q I'm going to show you what's been marked as
14 Plaintiffs' Exhibit 19-2B and ask you if you
15 recall looking at this floor plan or if you
16 can identify this.
17 A Yes.
18 Q And what is this?
19 A This is the floor plan of 16B.
20 Q Thank you. We would offer into evidence
21 Plaintiffs' Exhibit 19-2B.
22 MR. WAGNER: Another preliminary
23 question, if I may, Your Honor.
24 THE COURT: Go ahead.
25 PRELIMINARY QUESTIONS BY MR. WAGNER:

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1 Q What year is depicted on these drawings; do
2 you know? That is to say, the building
3 changed from time to time, I guess; is that
4 right? Building 16, they did renovations
5 and construction from time to time?
6 A I couldn't tell you what year. All the
7 buildings have been remodeled several times.
8 Q Would it be true of both of these drawings,
9 you don't know what year they would depict
10 as to the configuration of the building; is
11 that right?
12 A It's the present time. Is that what you
13 mean?
14 Q It's present as we sit here today?
15 A Yes.

16 MR. WAGNER: Well, Your Honor, I'm
17 not so sure it has any relevancy to the
18 issues in this case.

19 THE COURT: I'm not sure I
20 understood her testimony. Is that what the
21 Building B, what the building is today or
22 what it was five years ago? Why don't you
23 ask her.

24 MR. HOWARD: Okay, Your Honor,
25 we're only concerned about the day room and

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1 the nurse's station in general in A. And in
2 16B we're concerned about the nurse's

3 station, the day room and nothing in
4 particular about remodeling on the building.
5 So if I could --
6 BY MR. HOWARD:
7 Q Mrs. Jeffrey, this is 19A, and this area
8 here which, according to this, shows the day
9 room, is that where the day room was all the
10 time that you worked there in that building?
11 A That is correct.
12 Q And here is the nurse's station, 104. Is
13 that where the nurse's station was all the
14 time that you were there in the building?
15 A That is correct.
16 Q And that's never changed?
17 A No.
18 Q And if there was any remodeling that
19 Mr. Wagner asked about, that had nothing to
20 do with that area?
21 A No.
22 Q Now we'll go to 16B. Does this show the day
23 room on 16B, 216?
24 A That's right.
25 Q Does that show the nurse's station?

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1 A Right.
2 Q And does it show the break room on 16B?
3 A That was this area here.
4 Q Is that the same as it was when you worked
5 there?
6 A Yes.
7 Q And it's still that's what is shown here?
8 A Yes.
9 Q Even though this drawing may say 1994 on it
10 or 1997, it's had some changes. But that
11 has not changed?
12 A No.
13 Q And that was the way it was all the time you
14 worked there?
15 A Right.
16 THE COURT: Any objection to B,
17 Counsel?
18 MR. WAGNER: No objection, Your
19 Honor.
20 MR. OHLEMEYER: No objection.
21 THE COURT: Plaintiffs' Exhibit
22 19-2B will be admitted. Go ahead,
23 Counselor.
24 (Plaintiffs' Exhibit(s) 19-2B received
25 in evidence.)

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1 BY MR. HOWARD:
2 Q Mrs. Jeffrey, while we're at it, could I ask
3 you to step down here a minute.
4 A Sure.
5 Q I'm going to show you Plaintiffs' Exhibits
6 19-2A, and I'm going to give you a red
7 marker, and if you could for the jury just
8 mark in red just kind of outline where the
9 day room was.
10 A (Witness complies with request.)
11 Q Let me have you use red also, and if you
12 would just kind of outline the -- where the
13 nurse's station was.

14 A (Witness complies with request.)
15 Q Now, there appears to be, in looking at
16 19-2A, that there is a wall or something
17 here between the day room and the nurse's
18 station.
19 A It was a counter.
20 Q A counter?
21 A Yes. It was open up above.
22 Q No wall. Okay.
23 When you worked on 16A, exactly -- did
24 you have a desk there?
25 A Yes, I did.

1751

1 Q And would you for the jury mark an X on
2 where your desk was.
3 A (Witness complies with request.)
4 Q And let's -- on where you've made the
5 counter was, can you go ahead and just make
6 a squiggly line on that so that we'll know
7 that that's a counter.
8 A (Witness complies with request.)
9 Q You can have a seat. I'll probably get you
10 back up here.
11 A Okay.
12 Q When you went back to Building 16A to work,
13 I believe, in 1981, do you know who the
14 staff nurse was on Building 16A in 1981?
15 A Who were the staff nurses?
16 Q Who was the staff nurse on 16A? Did you
17 know who the staff nurses were?
18 A Mildred Wiley, Monica Polson. Do you want
19 the day shift and the PM shift?
20 Q Did Mildred Wiley work on the day shift?
21 A Primarily.
22 Q All right. And that's the same shift you
23 worked -- or what shift did you work?
24 A I worked from 7:45 to 4:30.
25 Q And where would the staff nurses be located?

1752

1 Did they have a desk?
2 A Yes, they did.
3 Q And did they all have the same desk; they
4 just used it for different shifts?
5 A No. Their desk was up under the counter
6 right in front of mine.
7 Q I'll just bring the drawing to you this
8 time, okay. I'll ask you, if you could, for
9 the jury to put an X on where that, the desk
10 would be for the staff nurse.
11 A (Witness complies with request.)
12 Q When you said that Mildred Wiley worked
13 primarily days, do you know what other shift
14 she worked or did she do that on a regular
15 basis, work another shift?
16 A She worked other shifts sometimes which
17 would be from 3:00 to 11:00. Pardon me. It
18 was from 4:00 to 12:00. And the night shift
19 was from midnight to 8:00 in the morning.
20 Q Is that something all the staff nurses did,
21 was to rotate?
22 A Yes.
23 Q Or what would it -- what would be the
24 occasion that she wouldn't be there working

25 days? Why would she not be there days
1753
1 working?
2 A They needed the staff on another shift.
3 Q So she would basically fill in on another
4 shift?
5 A Yes.
6 Q But the day shift was her regular shift?
7 A Yes.
8 MR. WAGNER: Well --
9 Q Now, as a ward clerk working there in 16A,
10 did you have occasion to go up to 16B also?
11 A Yes, I was assigned to both floors.
12 Q While we're marking the exhibits here, let
13 me -- maybe you could step down and we'll
14 mark this one up.
15 I want to ask you to mark for the jury
16 three areas. First of all, 16B, would you
17 mark the day room and just kind of outline
18 it, the three sides of it.
19 A (Witness complies with request.)
20 Q And could you, using the -- that red, could
21 you also mark the location of the nurse's
22 station.
23 A (Witness complies with request.)
24 Q And could you also mark with that red pen
25 where the day room -- where the break room
1754

1 is located.
2 A That's -- three sides of it? (Witness
3 complies with request.)
4 Q Now, once again, up in the 16B, the line
5 that appears here between the nurse's
6 station and day room, was that a wall or a
7 counter?
8 A No. That's a counter.
9 Q All right. Could you take the green and
10 just make a little squiggly there so that we
11 know that that's a counter.
12 A (Witness complies with request.) This is a
13 counter.
14 Q Thank you. When you started at the VA, you
15 started in what building, again, if you
16 recall? What building did you start when
17 you started with the VA?
18 A I trained on 138-2.
19 Q Was there smoking in that building?
20 A Yes.
21 Q Did the patients smoke in that building?
22 A Yes.
23 Q The staff smoke in that building?
24 A Yes.
25 Q You've told the jury you've worked in a
1755

1 number of other buildings at the VA.
2 A Yes.
3 Q In all of those buildings were there any
4 exceptions? Was there a building where the
5 patients and the staff did not smoke?
6 A No.
7 MR. WAGNER: Your Honor -- never
8 mind.
9 THE COURT: What was your answer,

10 ma'am?

11 THE WITNESS: No.

12 Q When you worked in 16A, did you observe

13 patients smoking? Did you see patients

14 smoking in 16A?

15 A Yes.

16 Q Did you see staff smoking?

17 A Yes.

18 Q Tell the jury a little bit about what you

19 observed. Let's start with the day room and

20 see what you observed about the smoke in the

21 day room.

22 A It was very thick and concentrated. The

23 patients down there weren't able to smoke

24 themselves, so the staff would put the

25 cigarette in their mouth and light the

1756

1 cigarette and take it out periodically, and

2 that's how they smoked.

3 Q Were these patients that could not leave the

4 building?

5 A Right. They didn't have privileges.

6 Q Now, could some of them smoke themselves, I

7 mean, actually hand the cigarette?

8 A Very few on 16A.

9 Q And would they congregate, would they be

10 located in the day room during the day?

11 A Yes.

12 Q How many on a typical day, how many would

13 be -- let's get a point in time when you

14 first went there, 1981 when you went back

15 there. Can you tell the jury about how many

16 people you would see at a time -- let's talk

17 about patients first -- smoking in that day

18 room.

19 A They took the majority of the patients to

20 the day room. If they were seriously ill

21 they left them in bed, but I would say if

22 the capacity is 18 on that ward, and there

23 would be probably 16 of them in the day

24 room.

25 Q And some of them were able to smoke for

1757

1 themselves and some of them had to be helped

2 to smoke?

3 MR. WAGNER: Objection, Your Honor,

4 leading.

5 THE COURT: The last was leading.

6 Q All right. Sorry. Some of them could smoke

7 for themselves?

8 A Yes, a few.

9 Q Did you see any staff people smoking in the

10 day room area?

11 A Yes.

12 Q Who would you see smoking in the day room

13 area? What would the staff be -- what would

14 that consist of?

15 A Pardon me?

16 Q Who did you see, what staff titles or jobs,

17 who would be smoking?

18 A The nursing assistants and the RNs.

19 Q Some of the RNs also smoked?

20 A Some of them, yes.

21 Q What about the nurse's station; was smoking
22 when you got to Building 16A in 1991, was
23 smoking allowed in the nurse's station?
24 A Yes, it was. They would come in to do their
25 charting on the charts, and light up their

1758

1 cigarettes and a lot of times would leave
2 the area with their cigarettes smoldering in
3 the ashtray to go do something else and come
4 back.

5 Q Mrs. Jeffrey, are you familiar with a
6 discolorment that is sometimes left on
7 surfaces by tobacco smoke?

8 A Pardon me?

9 Q Are you familiar -- are you having a problem
10 hearing?

11 A Yes, I do have a problem with my hearing.

12 Q All right. Mrs. Jeffrey, are you familiar
13 with a discoloration --

14 A Oh, yes.

15 Q -- that is left by tobacco smoke?

16 A Anytime --

17 Q Okay.

18 A -- you would take a damp cloth and rub over
19 the file cabinets, the desks, the chart
20 rack, you had a yellowish brown stain.

21 Q Can you describe for the jury what kind of
22 charts you used, what the charts were made
23 of?

24 A They used plastic charts, and I would clean
25 them periodically, and the best way I can

1759

1 clean them was to clean some charts there
2 and put the material in the clean charts and
3 then I would empty up and take the dirty
4 ones home and clean them. I have taken
5 hundreds of charts home to clean.

6 Q During this period of time were you a
7 smoker?

8 A No.

9 Q Have you ever been a smoker?

10 A No.

11 Q Did that smoke affect you there at the --

12 A Yes.

13 MR. WAGNER: Excuse me, just a
14 minute, Your Honor. Objection. Not
15 relevant.

16 Can I put this down for now?

17 THE COURT: Please.

18 MR. WAGNER: Objection, Your Honor,
19 as to relevancy.

20 THE COURT: The last question, that
21 objection is overruled. You may answer.

22 The question was did the smoke affect
23 you.

24 A My eyes would water, and I would cough.

25 Q Mildred Wiley was working at a desk right in

1760

1 front of you?

2 A Yes.

3 Q And would you see her at other locations in
4 the hospital?

5 A Oh, yes. She was -- she was an hands-on

6 worker. She was everywhere.
7 Q Did she spend much time at this desk?
8 A No. Just when she had to, to get her
9 paperwork.
10 Q Would you see her over in the day room?
11 A Yes.
12 Q Did you ever have occasion to see her on
13 16B?
14 A Yes.
15 Q Can you tell the jury about what you
16 observed when you saw her on 16B. First of
17 all, why would you go to 16B when Mildred
18 Wiley was up there?
19 A To take off doctors' orders, to transcribe,
20 make appointments.
21 Q Did you ever go to the break room on 16B?
22 A Yes.
23 Q Can you tell the jury what you observed
24 about the smoke conditions in the break room
25 at 16B.

1761

1 A They had a break area that they had their
2 morning meetings in, and on occasion I would
3 need to take telephone messages to
4 Mrs. Wiley. And when I would open the door
5 to go in there, it was just blue with smoke.
6 Q And did you have an opportunity to observe
7 Mildred Wiley in the day room on 16B?
8 A Yes.
9 Q And what were the smoke conditions like
10 there on 16B?
11 A The same. We had some patients that weren't
12 able to hold their cigarettes, and she would
13 what they call smoke them.
14 Q And did you ever see her in the nurse's
15 station on 16B?
16 A Yes.
17 Q I think you just told the jury that Mildred
18 Wiley would smoke the patients. Why would
19 you remember that?
20 A Well, I made the remark one time that that
21 was probably the only time -- we always
22 called her Millie, the only time that Millie
23 ever held a cigarette in her hand was when
24 she was smoking the patients.
25 Q Now, we say "smoke the patient," she

1762

1 wouldn't put the cigarette in her mouth,
2 would she? She would just put it in their
3 mouth?
4 A Yes.
5 Q By the way, did you ever know a man there at
6 the VA by the name of John Chrisman?
7 A Yes, sir.
8 Q Do you know who he was?
9 A He was the director of the hospital.
10 Q Do you know when he was the director?
11 A Not right off.
12 Q If I told you he was the director --
13 MR. WAGNER: Objection, Your Honor,
14 it's going to be leading and suggestive. I
15 can tell.
16 THE COURT: Sustained.

17 MR. HOWARD: I'm not going to say
18 it then, Judge.
19 Q Getting back to Mr. Chrisman, your desk
20 is -- continued to be right here until 1997
21 when you retired?
22 A Right.
23 Q Do you recall at any time during the years
24 that you worked there whether that would be
25 the early '80s, late '80s or what that you

1763

1 ever seen Mr. Chrisman in that building?
2 A No.
3 Q Did there come a time that you can recall,
4 Betty, that -- I'm sorry. I've talked with
5 you an awful lot. It's Mrs. Jeffrey, I'm
6 sorry -- that they restricted the smoking
7 there on 16A?
8 A The building became smoke free on November
9 the 1st of '92.
10 Q Is that the first you recall about any
11 restrictions, Betty? Mrs. Jeffrey?
12 A I think they had brought it to our attention
13 that smoke was hazardous before that.
14 Q Betty, did you know -- what did you think
15 about the smoke that was around you as you
16 worked there in 16A?

17 MR. WAGNER: Objection, Your Honor,
18 as to what the mental processes of this
19 witness were.

20 THE COURT: Why don't you make your
21 question more specific, Counselor.

22 MR. HOWARD: All right.
23 Q Did you like the smoke there that was around
24 you?
25 A No.

1764

1 Q Did you have conversations with Mildred
2 Wiley about the smoke that was there in 16A
3 and 16B?
4 MR. WAGNER: Objection, Your Honor,
5 it's going to be hearsay.
6 THE COURT: She can answer that yes
7 or no.
8 Q Did you ever talk with Mildred Wiley,
9 Mrs. Jeffrey, about the smoke that was
10 there?

11 MR. WAGNER: Yes or no.
12 A Yes.
13 Q I think you've told us you didn't like it,
14 did you?
15 A Right.
16 Q Did you ever file a complaint with the --
17 A No.
18 Q Why didn't you file a complaint,
19 Mrs. Jeffrey?

20 MR. WAGNER: I'm sorry, Mr. Howard.
21 Objection, Your Honor, as to what her mental
22 processes were, motivations were. She can
23 testify to facts or what she did or didn't
24 do but she can't testify to her mental
25 process.

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1 And one more objection, Your Honor, her

2 motivation is not an issue in this case, so
3 it's irrelevant.
4 MR. HOWARD: Can I have one more
5 response, Judge?
6 THE COURT: Sure.
7 MR. HOWARD: They have talked with
8 this jury about Mildred Wiley didn't file a
9 formal complaint.
10 MR. WAGNER: I object to these
11 speaking objections and arguments before the
12 jury of this type.
13 MR. HOWARD: We don't have
14 record --
15 THE COURT: The objection is
16 overruled. You can answer the last
17 question. He asked you why you didn't file
18 a complaint.
19 A We didn't think there was anything we could
20 do about it. We accepted that as part of
21 our environment.
22 Q Did you have any knowledge or information at
23 that time as to the health risks associated
24 with secondhand smoke?
25 MR. WAGNER: Your Honor, objection,
1766
1 as to --
2 A No.
3 THE COURT: I'll sustain that
4 objection.
5 MR. WAGNER: Move the answer go
6 out.
7 THE COURT: Her answer will go out.
8 The jury will disregard the response.
9 Ma'am, if there is an objection by one
10 of the attorneys, I do not want you to
11 answer until I tell you. Okay. Thanks.
12 MR. MOTLEY: Your Honor, may we
13 approach for a moment?
14 THE COURT: Sure.
15 (Bench discussion.)
16 THE COURT: Continue, Counselor.
17 BY MR. HOWARD:
18 Q Mrs. Jeffrey, did Mildred Wiley ever make
19 any statements to you or express any concern
20 that she -- about her employment at the VA
21 due to the possible health risks associated
22 with secondhand smoke?
23 MR. WAGNER: Your Honor, again I
24 object again --
25 THE COURT: You do not have to
1767
1 answer that, ma'am. That objection is
2 sustained.
3 Q Mrs. Jeffrey, before 1991, did you ever
4 receive any bulletins or any information
5 from the VA Hospital concerning possible
6 health risks associated with environmental
7 tobacco smoke?
8 MR. WAGNER: Your Honor, objection.
9 That would call for hearsay as to what was
10 in a document.
11 THE COURT: Overruled. You may
12 answer that, ma'am.

13 A No.
14 Q Mrs. Jeffrey, before 1991, did you ever
15 receive any type of warning from the VA
16 Hospital concerning possible health risks
17 associated with environmental tobacco smoke?
18 MR. WAGNER: Objection, Your Honor,
19 as to what this witness may or may not have
20 received, and it calls for this witness to
21 testify about hearsay.
22 THE COURT: Overruled. You may
23 answer that, ma'am.
24 A No.
25 Q Before 1991, did you ever receive any

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1 publications from tobacco companies
2 concerning possible health risks associated
3 with environmental tobacco smoke or what is
4 referred to as secondhand smoke?
5 MR. WAGNER: Same objection, Your
6 Honor, as to the previous question, plus
7 there is no foundation laid that she was in
8 a position to receive anything from any
9 tobacco companies.
10 THE COURT: Is your question during
11 her employ or at her employment? I don't
12 understand your question. Make it more
13 specific.

14 MR. HOWARD: All right.
15 Q Prior to -- before 1991, did you receive any
16 information in any form from the tobacco
17 industry about the health hazards associated
18 with secondhand smoke?

19 MR. WAGNER: Now, Your Honor, again
20 we object for the reasons previously stated.
21 It's irrelevant as to what this witness may
22 have received.

23 Secondly, she would be testifying to
24 hearsay.

25 Thirdly, there is no time frame

1769

1 specified here except some broad time frame.
2 We're also objecting on the basis of
3 preemption, Your Honor, as previously
4 briefed in this case.

5 And fourthly, there is no foundation
6 laid that this witness would be in a
7 position to have received anything of that
8 nature.

9 MR. HOWARD: Judge, I forgot the
10 other three, but I know one, and it's not
11 hearsay. That is not an answer calling for
12 hearsay.

13 Q You are a resident of the United States,
14 aren't you?

15 A Yes.

16 Q And lived in [DELETED]?

17 THE COURT: I'm going to overrule
18 the objection. Now repeat your question.

19 Q Before 1991, did you ever receive any
20 information in any form from the tobacco
21 companies as to the health hazards
22 associated with secondhand smoke?

23 MR. WAGNER: Same objection.

24 A No.
25 Q Now, Mrs. Jeffrey, there came a time that
1770
1 Mildred Wiley wasn't at work anymore. Do
2 you recall that, when she got sick?
3 A It was May of '91, I believe.
4 Q Did you ever go to the hospital and see her?
5 A Yes, I did.
6 Q How often did you go, Mrs. Jeffrey?
7 A I went every day when I was on vacation.
8 Q How long was your vacation?
9 A A week.
10 Q Do you know what point in time that would
11 have been?
12 A Pardon?
13 Q Do you know when that would have been, what,
14 early May or late May, June?
15 A It was either May or June of '91.
16 Q Did you spend time there in the hospital
17 with Mildred? How much time would you spend
18 there with her normally?
19 A Ten, 15 minutes.
20 Q Did you observe her condition when you were
21 there?
22 A Yes.
23 Q Can you tell the jury a little bit about
24 what you observed about Mildred.
25 MR. WAGNER: Objection, Your Honor,
1771
1 this is cumulative.
2 THE COURT: I didn't hear you.
3 MR. WAGNER: Objection. This is
4 cumulative.
5 THE COURT: Overruled.
6 You can answer the question, ma'am. He
7 asked you generally what Mrs. Wiley's
8 condition was.
9 A Seriously ill.
10 Q Did you observe, if you did, if she was in
11 any pain?
12 A Pardon me?
13 Q Did you observe if she was in any pain?
14 A Yes.
15 Q Did you know what the nature of her
16 illness --
17 MR. WAGNER: Well, Your Honor,
18 objection. No foundation.
19 THE COURT: You can answer that yes
20 or no.
21 Q Did you know the nature of her illness?
22 A Yes.
23 Q How did you find that out?
24 MR. WAGNER: Well, this would call
25 for hearsay, Your Honor, obviously. How did
1772
1 you find that out, she's going to relate
2 what somebody else told her.
3 THE COURT: He didn't ask her to do
4 that.
5 Did you talk to a doctor?
6 THE WITNESS: No.
7 THE COURT: A family member?
8 THE WITNESS: I'd say it was from

9 the word of mouth from the VA.
10 THE COURT: All right.
11 MR. WAGNER: Hearsay, Your Honor.
12 THE COURT: Go ahead.
13 Q Do you know the nature of her illness?
14 MR. WAGNER: Hearsay, Your Honor.
15 THE COURT: Sustained. You do not
16 have to answer that. You don't have to
17 answer.
18 Q Mrs. Jeffrey, based upon your observations
19 of Mildred and the way she carried on her
20 day-to-day activities and lived her life,
21 did you -- from your observations, did she
22 have any knowledge as to the health risks
23 associated with secondhand smoke?
24 MR. WAGNER: Your Honor, objection,
25 no foundation.

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1 THE COURT: Sustained. You do not
2 have to answer that, ma'am.
3 Q Mrs. Jeffrey, do you have an opinion, based
4 upon what you observed about Mrs. Mildred
5 Wiley, as to whether Mildred was educated
6 regarding the health risks associated with
7 secondhand smoke?
8 MR. WAGNER: Objection, Your Honor.
9 No foundation. Calls for speculation on the
10 part of this witness.
11 THE COURT: Whether she was
12 educated.
13 MR. HOWARD: Whether she had
14 knowledge and information about the health
15 risks associated with secondhand smoke.
16 MR. WAGNER: There is no foundation
17 laid at all as to that question, Your Honor.
18 THE COURT: She can answer that
19 specific question.
20 You may answer that specific question.
21 A No.
22 Q From your observations of Mildred Wiley in
23 the workplace, did you know she was unaware
24 of the health risks of secondhand smoke?
25 MR. WAGNER: I'll object. Once

1774

1 again, this is sheer speculation.
2 THE COURT: Sustained as to that.
3 MR. HOWARD: I have no further
4 questions. Thank you, Mrs. Jeffrey.
5 THE COURT: Mr. Wagner, do you have
6 any questions?
7 MR. WAGNER: I have a few, Your
8 Honor.

9 CROSS-EXAMINATION
10 BY MR. WAGNER:

11 Q Mrs. Jeffrey, just so the record is clear,
12 you were at all times that you worked at the
13 Veteran's Hospital a medical clerk and not a
14 nurse; is that correct?
15 A I didn't understand the question.
16 Q Let me rephrase it, and I'll try to speak up
17 a little bit.
18 A Thank you.
19 Q But don't think I'm yelling at you. I'm

20 just going to speak a little louder so you
21 can hear me. Can you hear me all right?
22 A Yes.
23 Q Just so the record is clear, during the
24 entire time that you worked at the Veteran's
25 Administration Hospital, you were a medical

1775

1 clerk and not a nurse; isn't that correct?
2 A Yes.
3 Q And do you know the plaintiff in this case,
4 Philip Wiley?
5 A Yes.
6 Q And you knew Mrs. Wiley, as you've already
7 testified; correct?
8 A Yes.
9 Q And you've been in the Wileys' home on a few
10 occasions, have you not?
11 A Yes.
12 Q And visited with them at their home, with
13 Mr. and Mrs. Wiley while Mildred Wiley was
14 still living?
15 A Mr. Wiley wasn't at home when I was there.
16 Q You went there to visit Mildred?
17 A I went for lunch.
18 Q For lunch. And you said that Mr. Howard has
19 talked to you -- or I guess he said he
20 talked to you a few times. How many times
21 has Mr. Howard talked to you?
22 A I didn't understand that.
23 Q On how many different occasions has
24 Mr. Howard talked to you?
25 A I'd say three, four.

1776

1 Q And you consider Mildred Wiley to be a
2 friend, isn't that so?
3 A Yes.
4 Q And you also consider yourself to be a
5 friend of Philip Wiley; is that so?
6 A Yes.
7 Q I want to look at my notes here for just a
8 moment and may skip over some things that
9 have been said already.
10 These patients that were in Building 16
11 on the first floor were patients who
12 couldn't for the most part take care of
13 their daily needs; would that be correct?
14 A Yes.
15 Q Some of them were on tubes?
16 A Right.
17 Q They were fed by tubes?
18 A Yes.
19 Q Some of them were bedfast and couldn't get
20 out of bed?
21 A Yes.
22 Q Had patients there that couldn't walk?
23 A Right.
24 Q And some of them were psychotic patients?
25 A Yes.

1777

1 Q Some of them were on oxygen from time to
2 time?
3 A Yes.
4 Q A lot of those patients, I would guess, were

5 also up in years. Is that so?
6 A Pardon?
7 Q A lot of those patients on the first floor
8 of Building 16 were up in years.
9 A Yes.
10 Q Older than you and I?
11 A Yes.
12 Q Now, all of those patients didn't smoke, did
13 they?
14 A No.
15 Q And all of the staff didn't smoke; isn't
16 that correct?
17 A Not all.
18 Q Now, the hospital that you worked in was a
19 Veteran's Administration Hospital; correct?
20 Did you hear my question?
21 A I didn't understand it.
22 Q The hospital that you worked in was a
23 Veteran's Administration Hospital.
24 A Yes.
25 Q It was run and operated by the Veteran's

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1 Administration.
2 A That's right.
3 Q And the Veteran's Administration is a part
4 of or an agency of the United States
5 government; isn't it?
6 A Yes.
7 Q And you knew that when you worked there?
8 A Yes.
9 Q And whatever restrictions there were that
10 allowed people to smoke or not smoke in that
11 hospital, that was done by the Veteran's
12 Administration. They had the right to make
13 the rules; isn't that correct?
14 A Yes.
15 Q And, in fact, they did make the rules,
16 didn't they?
17 A Yes.
18 Q And if the nurses had to help the patients
19 smoke, that was a duty that was imposed upon
20 them by the Veteran's Administration; isn't
21 that correct?
22 A People in charge.
23 Q Right. Did the Veteran's Administration
24 that ran that hospital require you to have
25 an annual physical?

1779

1 A No.
2 Q Did they require the nurses to have annual
3 physicals?
4 A Yes.
5 Q One of the things Mr. Howard asked you about
6 was when Building 16 became smoke free. Do
7 you remember that? You have to answer out
8 loud so this lady can get down your answer.
9 A You want the date?
10 Q You already told us the date. I was just
11 asking you if you remember the question that
12 Mr. Howard asked you about that subject.
13 A Yes.
14 Q And I think you told him it became smoke
15 free in November of 1992; is that correct?

16 A Yes.
17 Q Now, isn't it a fact that that smoking
18 policy actually went into effect in early
19 1991?
20 A I -- it's possible, but from my notes, I had
21 put '92.
22 Q And weren't there restrictions on where
23 people could smoke in that hospital and who
24 could smoke in that hospital before 1991?
25 Is that -- have I confused you?

1780

1 A No. But I really couldn't -- I don't know
2 the date.
3 Q But you do know that there were restrictions
4 on where people could smoke in that hospital
5 before 1991; correct?
6 A Yes.
7 Q But you just don't remember the date.
8 A Right.
9 Q And if I asked you where those places were
10 where people could or could not smoke, you
11 couldn't tell me that either, I guess;
12 right?
13 A The employees went out on the porch.
14 Q The employees went out on the porch to
15 smoke?
16 A Or out on the back door.
17 Q You were in a position, weren't you, to see
18 what nurses all did? Let me break the
19 question down.
20 In your job as a medical clerk, you
21 were able to see what people like Mildred
22 Wiley, who were nurses, did on a day-to-day
23 basis; right?
24 A Yes.
25 Q And they had a lot of different duties,

1781

1 didn't they?
2 A Yes.
3 Q For example, they had to feed the patients.
4 A That's right.
5 Q And they had to administer medication to the
6 patients.
7 A Yes.
8 Q And they would have had to chart the
9 patient's progress.
10 A Yes.
11 Q And do you know what a chart is, where
12 you've got to go in and get the chart at the
13 bed and write down on it how the patient is
14 doing and what happened to him and all that.
15 Right?
16 A Yes.
17 Q And nurses had to check on the patients from
18 time to time, especially on Building 16
19 where they weren't in very good shape.
20 Right?
21 A Yes.
22 Q And they had to make rounds from time to
23 time; right?
24 A Yes.
25 Q And I suppose there were doctors that came

1782

1 into that Building 16 and looked after those
2 patients; right?
3 A Yes.
4 Q Wasn't just the nurses that were in there
5 taking care of them, but the doctors came
6 in; right?
7 A Yes.
8 Q And when the doctors came in, the nurses had
9 to help out the doctors to -- in some cases
10 to administer to the patients; right?
11 A Yes.
12 Q And talk to the doctors about the progress
13 that the patient was or was not making;
14 correct?
15 A Yes.
16 Q And nurses also had to go to meetings
17 sometimes, didn't they?
18 A Yes.
19 Q And they had to go to committee meetings?
20 A Yes.
21 Q And so sometimes those committee meetings
22 were in another building?
23 A Yes.
24 Q Sometimes they even had to go to seminars
25 and things that were not even in the

1783

1 hospital; right?
2 A Yes.
3 Q And some of these patients that couldn't
4 walk had to be transported to places from
5 time to time; right?
6 A Yes.
7 Q Like if they had to go to the X-ray room or
8 something like that, they would have to take
9 them; right?
10 A Yes.
11 Q And they had to administer oxygen to these
12 patients from time to time; correct?
13 A Yes.
14 Q And there were nursing assistants that
15 worked in Building 16; right?
16 A Yes.
17 Q And staff nurses like Mildred Wiley had to
18 supervise those nursing assistants, didn't
19 they? I'm sorry. Let me repeat. There
20 were nursing assistants in Building 16, that
21 worked in Building 16?
22 A Yes.
23 Q Nursing assistant is not a nurse but they do
24 some of the chores and the things that
25 nurses do; right?

1784

1 A Yes.
2 Q And the staff nurses like Mildred Wiley had
3 to supervise those nursing assistants;
4 correct?
5 A Yes.
6 Q And visitors would come into the hospitals
7 and see the patients from time to time;
8 right?
9 A Yes.
10 Q And when that would happen, sometimes the
11 nurses would have to talk to the visitors

12 about how the patient was getting along that
13 they came to see; correct?
14 A Yes.
15 Q And I guess there were some emergencies that
16 would take place every once in a while.
17 A Yes.
18 Q On that ward where somebody might -- their
19 heart might stop or they might need
20 something, and those nurses had to deal with
21 those things, too, didn't they?
22 A Yes.
23 Q And so these nurses didn't just stand around
24 in the day room all day, did they?
25 A No.

1785

1 Q They didn't stand around in the nurse's
2 station all day, did they?
3 A No.
4 MR. WAGNER: Thank you.
5 THE COURT: Thank you.
6 Mr. Ohlemeyer.
7 MR. OHLEMEYER: Just a couple, Your
8 Honor.
9 BY MR. OHLEMEYER:
10 Q Mrs. Jeffrey, my name is Bill Ohlemeyer. I
11 only have a few questions for you.
12 You told us about a break room. Do you
13 remember that this morning?
14 A Upstairs in 16B.
15 Q Who used the break room?
16 A The staff.
17 Q The patients -- it wasn't a break room for
18 the patients, was it?
19 A No.
20 Q And I want to make sure I understand
21 something you said about Mr. Chrisman. Is
22 it your testimony that Mr. Chrisman was
23 never in Building 16 or that you just never
24 saw him there?
25 A Well, I never saw him.

1786

1 Q Do you know whether he was ever in
2 Building 16?
3 A I'm not aware of it.
4 Q So if he told us that he had been in
5 Building 16, would that --
6 A He could have been.
7 Q There is no reason, there was no restriction
8 or any reason why he couldn't have been?
9 A No.
10 Q You told us a little bit about the shifts
11 that nurses work. There was a day shift.
12 A Right.
13 Q And then you said sometimes they would
14 rotate to a night shift.
15 A Yes.
16 Q Then there were times when they would have
17 to fill in on a night shift.
18 A Yes.
19 Q So there were -- a nurse could find his or
20 herself working three different shifts,
21 depending on what their regular shift was?
22 A Possible.

23 Q What their regular rotation was, and who
24 needed help?
25 A That's right.

1787

1 Q When you worked at the hospital, were you a
2 member of a union?
3 A Pardon me?
4 Q Were you a member of the union at the
5 hospital?
6 A No.
7 Q Were the nurses members of the union?
8 A Some of them were, I think.
9 Q Do you know what the union -- what a union
10 is and what it does?
11 A I'm aware it exists.
12 Q Did you ever become aware of any of the
13 grievances or the complaints that the union
14 made about working conditions at the
15 hospital?
16 A I've read articles.
17 Q Articles about the union?
18 A About the union.
19 Q And while you were employed at the hospital,
20 from time to time did you become aware that
21 the union made complaints about various
22 things to the administration?
23 A Yes.
24 Q That was a procedure that was in place and
25 was used?

1788

1 A Yes.
2 MR. OHLEMEYER: Thank you. That's
3 all I have.

4 THE COURT: Redirect, Mr. Howard?

5 MR. HOWARD: Your Honor, could I
6 ask permission to ask a couple of omitted
7 questions?

8 THE COURT: Go ahead.

9 OMITTED QUESTIONS BY MR. HOWARD:

10 Q Mr. Wagner asked you about something about
11 your duties there as a clerk. As your
12 duties as a clerk, did you ever have to
13 order supplies?

14 A Yes, I did.

15 Q Would you tell the jury some of the supplies
16 that you would order.

17 MR. WAGNER: Judge, this is outside
18 the scope and I think it's irrelevant in
19 addition to that. It's outside the scope of
20 redirect examination.

21 THE COURT: He asked permission.

22 MR. WAGNER: I do understand that,
23 Your Honor, but it's also irrelevant as to
24 supplies that she ordered.

25 THE COURT: Are you going to tie
1789

1 this up?

2 MR. HOWARD: I'll tie it up, Your
3 Honor, I promise.

4 THE COURT: Go ahead.

5 Q Did you order supplies?

6 A Yes.

7 Q And what kind of supplies did you order?

8 A Shaving supplies, body lotions, cigarettes.
9 Q Did you order -- who did you order the
10 cigarettes for?
11 A Pardon me?
12 Q Who would you order cigarettes for?
13 A If the patients were unable to go to the
14 canteen and handle their own money, then we
15 were permitted. If the staff told me that
16 they needed cigarettes, I would order them
17 on a purchase order and send it to the
18 canteen, and the canteen delivered it to the
19 ward.
20 Q Okay. Last omitted question. Do you
21 remember any of the brands that you ordered?
22 MR. WAGNER: Could I approach, Your
23 Honor?
24 THE COURT: All right.
25 MR. WAGNER: Need to approach.

1790

1 THE COURT: All right.
2 (Bench discussion.)
3 THE COURT: Thank you.
4 Mr. Howard, any other questions for
5 this lady?
6 MR. HOWARD: Yes, Your Honor.
7 Thank you for allowing me to ask the omitted
8 questions.
9 THE COURT: All right.

10 REDIRECT EXAMINATION

11 BY MR. HOWARD:

12 Q Mrs. Jeffrey, Mr. Wagner asked you about you
13 being a friend of Mildred Wiley, friend of
14 Philip Wiley, visiting in their home and
15 talking to me how many times, three or four.
16 That doesn't in any way affect -- you
17 wouldn't come here and tell anything but the
18 truth, would you, Mrs. Jeffrey?
19 A What was the question?
20 Q Your association with Phil Wiley and Mildred
21 Wiley and your talking to me a few times,
22 would that have anything to do with whether
23 or not you're telling the truth here?
24 A Oh, no.
25 Q Did you come here to tell the truth? And

1791

1 you would tell the truth regardless of how
2 good a friend Mildred Wiley and how much you
3 loved her?
4 A That's right.
5 Q And what you thought or didn't think of me?
6 A Yes, sir.
7 Q Thank you. Mr. Wagner asked you about the
8 patients that could smoke. Would you say
9 while you were there during that period
10 starting in 1981 -- and let's just use that
11 date. In 1981, in the early '80s, maybe,
12 what would you say, what percentage of the
13 patients smoke, if you know? Just more than
14 half or can you tell the jury what you
15 believe about what you observed about the
16 number of the percentage of patients that
17 smoked? If you know.
18 A I don't know what the percentage would be.

19 Q Would you say the majority?
20 MR. WAGNER: Well, Your Honor,
21 leading, suggestive.
22 THE COURT: Sustained. You asked
23 her, she said she didn't know.
24 MR. HOWARD: Well, she said
25 percentage.

1792

1 THE COURT: Your word.
2 Q When Mr. Wagner asked you about the nurses
3 running back and forth doing different
4 things, if a nurse was doing something down
5 here and wanted to go down here, would they
6 have to pass through this area here?
7 A They would have to pass between the -- not
8 between.
9 Q They would pass through between the area
10 between the --
11 A Pass by the nurse's station and the day
12 room.
13 Q Pass by the day room?
14 A Yes.
15 Q Now, if they went to a meeting -- Mr. Wagner
16 asked about them going to meetings. If they
17 went to a meeting up here in 2-17, would
18 there be smoke in there, if you know?
19 A Yes. I'm sorry. When I told you they would
20 pass by, I thought that was 16B. On 16A,
21 they would pass through. On 16B they would
22 pass by.
23 Q Okay. Because there on 16B they're both on
24 the same side.
25 A There's a hallway between.

1793

1 Q Do you know if they allowed smoking -- did
2 you ever see anybody smoking in the
3 hallways, Mrs. Jeffrey?
4 A I don't remember seeing them do that.
5 Q Mr. Wagner asked you about the VA permitting
6 by their rules smoking in that area. Do you
7 know why smoking was permitted in the
8 nursing station at the VA Hospital when you
9 were there?

10 MR. WAGNER: Objection, Your Honor.
11 No foundation and it calls for commentary as
12 to why.

13 THE COURT: Sustained.

14 MR. WAGNER: Can I put this down?

15 THE COURT: Please.

16 Q Mrs. Jeffrey, based upon the fact that the
17 VA permitted the smoking, does that
18 observation give you an opinion as to
19 whether or not the Veteran's Administration
20 knew of the hazards of secondhand smoke that
21 they were subjecting their --

22 MR. WAGNER: Objection, Your Honor,
23 no foundation, speculation.

24 THE COURT: Objection sustained.

25 Q Mr. Wagner asked you about the smoking

1794

1 restrictions. While you were there up
2 until, I think you said 1992, were you aware
3 that they ever restricted the smoking in the

4 day room on 16A?
5 A In '92?
6 Q Yes. By the patients? Could the patients
7 smoke in the day room up until 1992, the
8 best of your recollection? Could they or
9 couldn't they, up until 1992. Patients.
10 A I'm confused.
11 Q Okay. Mr. Wagner asked you about
12 restrictions, that smoking became restricted
13 in certain parts of the building before
14 1992.
15 A Yes.
16 Q In 1992 you told the jury that the building
17 went smoke free. Before the building went
18 smoke free, did it ever change that the
19 patients could always smoke in the day room
20 until the time it went smoke free?
21 A Yes.
22 Q Do you recall if the restrictions had mostly
23 to do with patients or staff, if you recall?
24 A Both.
25 Q The restriction. That's when it went smoke
1795

1 free.
2 A Right.
3 Q Your shift hours were what again? What were
4 your normal shift hours?
5 A From 7:45 to 4:30.
6 Q And for the nurses, what was the --
7 A From 7:30 to midnight.
8 MR. WAGNER: Your Honor, this is
9 all repetitious.
10 THE COURT: We've been through
11 this.
12 THE WITNESS: I'm sorry.
13 THE COURT: I was talking to him.
14 MR. HOWARD: It's not your fault.
15 It's mine. You're answering my questions.
16 I'm just asking the wrong questions.
17 Q If Mildred Wiley worked the second shift,
18 her hours would have been what again?
19 A Second shift?
20 Q Yes.
21 MR. WAGNER: All repetitious, Your
22 Honor.
23 A It would be 4:00.
24 Q Let me -- did the nurses come in -- was
25 there an overlap between the nurses when
1796

1 they came in between the first shift and the
2 second shift?
3 MR. WAGNER: This is outside the
4 scope.
5 A Yes, they were to be there ten minutes.
6 MR. WAGNER: Outside the scope.
7 This is outside the scope of redirect
8 examination, proper redirect examination.
9 THE COURT: I'm going to permit her
10 to answer the last question. Was there an
11 overlap when one shift would come in, would
12 other nurses still be there?
13 THE WITNESS: Yes.
14 THE COURT: All right.

15 MR. HOWARD: No further questions.
16 THE COURT: Mr. Wagner?
17 MR. WAGNER: We have no further
18 questions, Your Honor.

19 THE COURT: Mr. Ohlemeyer?

20 MR. OHLEMEYER: Nothing, Your
21 Honor.

22 THE COURT: Thank you very much,
23 ma'am. You may step down.

24 Call your next.

25 MR. HOWARD: Your Honor, I think
1797

1 you told us the other day -- I forgot the
2 lunch break.

3 THE COURT: We're going to break
4 around 1:30. So call your next.

5 MR. HOWARD: Judge, could we have
6 just a couple minutes? We're going to
7 introduce the employment records and tax
8 returns. We've got to get those.

9 THE COURT: Go ahead.

10 The jury has indicated they would like
11 a break. We will break for five minutes.

12 (Standard admonition)

13 (A brief recess was taken.)

14 MR. CASSELL: All rise.

15 THE COURT: All right. Be seated.
16 Jury is back in its entirety back with the
17 alternates.

18 Call your next, Mr. Howard.

19 MR. HOWARD: Your Honor, at this
20 time the Plaintiffs would offer into
21 evidence the certification of certified
22 employment records being Plaintiffs'
23 Exhibits 21-1, 21-2, 21-3, 21-4, 21-5, 21-6,
24 21-7, 21-8, 21-9, 21-10, 21-11, 21-12,
25 21-13, 21-14, 21-15, 21-16, 21-17, 21-18,

1798

1 21-19, 21-20, 21-21, 21-22, 21-23, 21-24,
2 21-25, 21-26, 21-27, 21-28, 21-29, 21-30,
3 21-31, 21-32, 21-33, 21-34, 35, 36, 37, 38,
4 39, 40, 41. 21-43 is the next one. 21-44,
5 21-45, 21-46, 21-47, 21-48, 21-49, 21-50,
6 21-51, 21-52, 21-54.

7 I believe that a couple of those that I
8 skipped over, I believe that one of them was
9 introduced into evidence already.

10 What the Plaintiffs would like to do,
11 Your Honor, I've prepared a -- Defendants
12 have a set of these as they're presented
13 with copies run for the jury, and with the
14 Court's permission, I would like to give a
15 set of these documents to the jury and then
16 rather than have them sit and try to read
17 through all these, if I could read portions
18 of them or highlight on the monitor certain
19 portions of those. And as I do that, I
20 would tell the jury which exhibit I'm going
21 to refer to and also would give the
22 Defendants an opportunity by telling what
23 exhibit I was going to refer to.

24 THE COURT: All right. The offer
25 is Exhibits 2-11 through 21-54, excluding 53

1 and 42. Any objection, Mr. Wagner? Or
2 Mr. Ohlemeyer?

3 MR. OHLEMEYER: I have no
4 objection, Your Honor. As a matter of
5 procedure, under Rule 106 there may be
6 portions of these records that I'd like to
7 read and I assume what I'll do when
8 Mr. Howard is done with a specific exhibit,
9 I'll read my portions.

10 THE COURT: That's fine.

11 MR. OHLEMEYER: Any objection?

12 THE COURT: Any objection, Mr.
13 Wagner?

14 MR. WAGNER: No, Your Honor, with
15 that organization, we have no objection.

16 THE COURT: Plaintiffs' Exhibits
17 21-1 through 21-54, excluding 42 and 53 are
18 now admitted.

19 (Plaintiffs' Exhibit(s) 21-1 through
20 21-54 excluding 42 and 53 received in
21 evidence.)

22 THE COURT: Mr. Howard, you may now
23 exhibit what you like of those exhibits.
24 Bailiffs will pass out copies of those for
25 the jury so they can go along with you,

1800

1 Counselor.

2 MR. HOWARD: Plaintiffs' Exhibit
3 21-1. An abstract from the lower portion of
4 that report, "She was a role model for her
5 staff. She was highly respected by her head
6 nurse peer group and nursing administration.
7 She will be remembered with esteem by all
8 who knew her."

9 MR. OHLEMEYER: Your Honor, very
10 briefly from the same exhibit, "She was
11 timely and accurate in all reporting,
12 counselings and maintaining of information.
13 She served on nursing service committees and
14 was recorder of the Intermediate Quality
15 Management Cluster."

16 MR. HOWARD: Plaintiffs' Exhibit
17 21-2, page 1. "She leads, directs, and
18 simplifies professional nursing through both
19 administration and clinical expertise."

20 Further down: "As a leader in the
21 collaborative efforts of other nursing
22 members, she was successful in the
23 rationalization of the negative impact on
24 the total care picture this proposal would
25 have on the patient."

1801

1 Further down on the same page: "Her
2 fairness and honesty are hallmarks of her
3 professionalism."

4 Further down on the page: "She is
5 dedicated to the provision of highest
6 attainable caliber of nursing care."

7 Go to 21-3. "Mrs. Wiley maintains a
8 role of leadership in her capacity as head
9 nurse."

10 Further down on the page, "Her peer and

professional staff relationships are excellent."

MR. OHLEMEYER: From the same exhibit, Your Honor, which is dated August 1, '88 to August 1, '89, "She maintains communication through formal and informal methods. Her oral and written reporting is timely, concise and complete."

MR. HOWARD: 21-4, second page: "She role models one to one family care for her staff as she cares for these terminally ill, non-ambulatory, non-verbal patients. Through her leadership to improve patient care, two high-risk patients were accepted by the Rehabilitation Medical Unit."

1802

Going down to the last sentence in that paragraph, "Under her guidance two troubled employees have chosen the Employee Assistance Program and an improvement in their job performance resulted."

Last sentence, "She is truly an asset to this VAMC." Date, 6-20-88.

MR. OHLEMEYER: In that same exhibit, Your Honor, "Through her leadership to improve patient care, two high-risk patients were accepted by the Medical Rehabilitation Medical Unit. She continues to lead monthly staff meetings with all tours. She chaired the InterRater Reliability Group for evaluators in immediate care. Mrs. Wiley attended a RMEC offering, "The Head Nurse as Manager," and has applied the principles learned in her decision making.

"She is a member of NOVA, and continues a mentor relationship with lower grade and less experienced."

MR. HOWARD: 21-5, second page. Fourth line down, "She collaborates with other health professionals to assure quality

1803

care for the patients at this VAMC, e.g., initiated and led multidisciplinary team meetings to re-evaluate a patient's care when the patient's family was unwilling to accept the lack of improvement in the patient."

Going down in the same page: "As a result, the staff-family relationship improved. Her nursing practice is characterized by leadership in improving nursing care."

MR. OHLEMEYER: From the same exhibit, Your Honor, "Sound judgment is utilized as new challenges arise." For example, "Met the challenge of planning quality care for a patient with AIDS. Assisted the staff in coping with the fear and apprehension, provided in-services and led them to develop a detailed plan of care. Feelings were openly expressed, accepted and employees supported by this head nurse."

22 MR. WAGNER: Just a point of
23 clarification, too, Judge, I believe what
24 Mr. Howard was reading was not displayed on
25 the screen. What's displayed on the

1804

1 screen --

2 MR. HOWARD: This is all new high
3 tech to me, Judge.

4 MR. WAGNER: Any new break area was
5 identified which is larger and better
6 ventilated is what was displayed on the
7 screen.

8 MR. HOWARD: I don't have anything
9 marked. Can we go on to -- are you done
10 with 21-5?

11 MR. OHLEMEYER: No. I have one
12 other thing. On the same exhibit, Your
13 Honor, "Correspondence and reporting are
14 timely and accurate, i.e., unit problems,
15 patient and staff concerns and requested
16 information are consistently reported.
17 Staff morale was greatly improved as Mrs.
18 Wiley solved the problem created by adding
19 the new telephone system to remove a large
20 portion of the break room. A new break room
21 was identified, which is larger and better
22 ventilated. The application of the
23 principles and learning tools provided in,
24 RMEC seminar at Danville Va has enhanced her
25 ability to cope with the challenges inherent

1805

1 to head nurses.

2 MR. HOWARD: Let's try 21-6.
3 Second page. "With families to comfort and
4 educate." Going further down on the page:
5 "Has demonstrated leadership in professional
6 practice as a staff nurse and as acting head
7 nurse, i.e., establish cooperation from all
8 staff to maintain continuity of care, for a
9 diabetic, obese patient with a stasis leg
10 ulcer facing amputation; thus resulting in
11 improvement of the ulcer. Is an effective
12 role model in the care of 48 intermediate
13 medical patients who are primarily
14 non-verbal." That's dated 6-10 of '86.

15 Going back up, which is not
16 highlighted, to the top of that page, it
17 says, "During the first six months of the
18 rating period Mildred Wiley served as a
19 staff nurse on 16AB, and during the last six
20 months, she served as Acting Head Nurse for
21 16AB."

22 MR. OHLEMEYER: The date 6-10-86.
23 Continuing, "She consistently demonstrates
24 the ability to work effectively with other
25 nursing personnel, as team leader and as

1806

1 acting head nurse with families to comfort
2 and educate, and with other services to
3 maintain a smooth functioning unit which
4 meets patients' holistic needs."

5 MR. HOWARD: 21-7, page 2.

6 MR. OHLEMEYER: I apologize,

7 Mr. Howard. On the next page of that same
8 exhibit, Your Honor, "Serves as a member of
9 the LPN Standards Board, was Safety
10 Coordinator as a staff nurse. Attended the
11 Supervisory Training Course, is a member of
12 NOVA. It is expected that Mrs. Wiley will
13 continue to develop administratively as she
14 demonstrates potential for greater
15 responsibilities."

16 MR. HOWARD: 21-7. Page 2. "Has
17 demonstrated leadership in professional
18 nursing practice by functioning as charge
19 nurse in the absence of the head nurse while
20 continuing to function as team leader to a
21 group of patients and personnel; also, after
22 noting diminished response to medications in
23 a patient with Parkinson's Disease,
24 researched literature on medication and then
25 collaborated with the ward physician

1807

1 presenting the findings. The patient's drug
2 therapy was changed, resulting in such
3 improved functioning that the patient was
4 able to feed himself."

5 Going down to the bottom below the date
6 of 7-2-85. "This nurse provides outstanding
7 professional care for the unit."

8 MR. OHLEMEYER: From the same
9 exhibit, Your Honor, Plaintiffs' Exhibit
10 21-7, "Has demonstrated the ability to work
11 effectively with others as team leader
12 working with supportive personnel.

13 Has demonstrated the ability to
14 initiate and lead groups by initiating and
15 leading a nurse support group for three
16 months, then continuing to lend guidance and
17 support to the group as other nurses assumed
18 the leadership role.

19 "Has demonstrated the ability to
20 collaborate with other health professionals
21 by establishing approaches and initiating
22 plans of care in conjunction with the
23 multidisciplinary treatment team.

24 "As has been outlined by example
25 throughout this proficiency, demonstrates

1808

1 the ability to identify, analyze, and
2 resolve patient care problems resulting in
3 significant improvement in nursing care to
4 individual patients.

5 "Has functioned as a consultant to many
6 other nurses who have been new to the unit,
7 sharing knowledge, skills, and abilities to
8 accurately assess and skillfully care for
9 the debilitated, geriatric patients.

10 Has developed a mentor relationship
11 with an Associate Grade nurse, guiding her
12 and setting VA career goals, professional
13 goals and personal goals, also continues a
14 mentor relationship with a nurse outside the
15 VA.

16 "Serves as a member of the Nurse
17 Professional Standards Board, twice

18 participating as a mock board member during
19 two workshops, quote, Pattern for
20 Advancement, closed quote. Serves as Fire
21 and Safety inservice coordinator on the
22 unit."

23 MR. HOWARD: Maybe I misheard him
24 or he misspoke. You didn't say member of
25 the union, did you? I thought you said

1809

1 member of the union.

2 MR. OHLEMEYER: Unit.

3 MR. HOWARD: 21-8. Second page.

4 Paragraph from the bottom -- the second
5 paragraph from the bottom: "She also shares
6 with the unit staff through team
7 conferences, direct patient care, and
8 inservices." Dated August 27, 1984.

9 MR. OHLEMEYER: Very briefly, Your
10 Honor. From the same exhibit, "She has
11 attended several workshops and in-services
12 appropriate to this unit, gaining insight
13 into current concepts and findings. She has
14 shared this information with all staff by
15 taping for all shifts, i.e., Writing Patient
16 Behavior Goals, and by bringing materials as
17 well as listings of videotapes she has seen
18 and felt beneficial to the center (Decubitus
19 Care, Ball State University presentation.)
20 This information was shared with Nursing
21 Education."

22 MR. HOWARD: Going to 21-9,
23 Plaintiffs' Exhibit 21-9, second page,
24 beginning of the second to the last
25 paragraph, "She has not used any unscheduled

1810

1 leave in the last year. She is aware of
2 staffing problems and often volunteers to
3 cover emergency staffing needs before
4 asked."

5 MR. OHLEMEYER: Am I correct,
6 Mr. Howard, this is the June 30, 1983?

7 "She assumes the responsibility for
8 initiating new programs and is thorough
9 carrying them out adhering to VA policy.
10 She uses her own initiative in reading the
11 policy, gathering the necessary forms and
12 instructing the personnel to keep them
13 current and informed and to gain their
14 cooperation."

15 Further on down: "She actively
16 participates in trying to implement new
17 methods, policies and equipment."

18 Further down: "She has served on
19 several VA committees and presently is
20 serving on the NPSB. She has served as a
21 preceptor and by example is a good role
22 model for new personnel. She strives to
23 keep herself current and informed on nursing
24 trends and VA policies by subscribing to RN
25 journals and attending at in-services."

1811

1 MR. HOWARD: Plaintiffs' Exhibit
2 21-10. Second page. The last paragraph,

3 last few sentences, starting about the
4 middle of the paragraph. "One case involved
5 a patient who came to 16A following a
6 'successful' cardiac resuscitation. The
7 patient was unresponsive and required
8 feeding through a levine tube. Under Mrs.
9 Wiley's guidance, the staff prepared a
10 nursing care plan with the goals of
11 returning the patient to eating and helping
12 to transfer when getting up. The patient
13 responded so well that soon he was feeding
14 himself, then began ambulating and has since
15 been discharged to his home to be with his
16 family."

17 MR. OHLEMEYER: This is Plaintiffs'
18 Exhibit 21-10, Your Honor, dated June 30,
19 1982. "Mrs. Wiley's major area of
20 assignment has been as charge nurse on 16A.
21 This is the unit on Building 16 that is used
22 to care for the most acute patients. This
23 unit is also the one most involved in
24 communications with other areas. Using her
25 experience and expertise, Mrs. Wiley is able

1812

1 to solve many minor problems and conflicts
2 at the unit level, therefore preventing
3 major difficulties from arising. Even
4 during periods of stress when the building
5 is very busy or on days when the staff is
6 disturbed over minor conflicts, Mrs. Wiley
7 remains calm and efficient. In emergency
8 situations, she is able to function
9 effectively and productively.

10 "Mrs. Wiley's working relationship with
11 all staff on the building is one of mutual
12 regard and understanding. She is very
13 willing to listen to others and they, in
14 turn, are very willing to help her carry out
15 her plan of action."

16 The last sentence on this evaluation,
17 Your Honor, is "Mrs. Wiley is a major factor
18 in the smooth-operating, cooperative
19 atmosphere that exists on Building 16."

20 MR. HOWARD: Plaintiffs' Exhibit
21 21-12, page 2. Dated June 27, 1980. First
22 part of the first sentence, "Mrs. Wiley's
23 integrity is above reproach."

24 MR. OHLEMEYER: "She is an
25 excellent role model for all nursing

1813

1 personnel in Building 16.

2 "Though the 23 patients on that floor
3 are total care, no decubiti have resulted
4 since their arrival on 16A eight months ago.
5 Not only does she identify problem areas
6 early herself, but encourages the staff to
7 be alert to subtle changes in the patients'
8 physical, emotional or behavioral needs.

9 "She continually looks for better ways
10 of doing things but never for personal
11 recognition. In fact, she's quite
12 embarrassed when someone praises her. Her
13 written communication skills also rate very

14 high. She records all pertinent information
15 in each patients' chart in a very acceptable
16 and concise manner, thus increasing the flow
17 of clear information between shifts.

18 MR. HOWARD: Plaintiffs' Exhibit
19 21-13. Second page dated 6-7-79. First
20 part of the top first sentence, "Mrs. Wiley
21 is honest, dependable, soft-spoken, quick to
22 notice changes in patients' conditions or
23 behavior and readily reports her
24 observations to me."

25 MR. OHLEMEYER: Same exhibit, Your
1814
Honor. "Her communications are outstanding.

2 "Starting last January, it became
3 necessary for Mrs. Wiley to rotate to the
4 evening tour of duty about eight evenings
5 per month. This she readily did without
6 complaint, despite the fact that the PM
7 shift is not desirable for her."

8 It's signed by Marie Parkinson and it
9 says position, H.N. Bldg. 16. June 7, 1979.

10 MR. HOWARD: Plaintiffs' Exhibit
11 21-14.

12 MR. OHLEMEYER: Your Honor, dated
13 July 18, 1978, signed by Jane C. McCuan,
14 head nurse, "Mrs. Wiley has performed as a
15 staff nurse on Building 16 during the past
16 year. She has been responsible for planning
17 the nursing care of 19 patients who have a
18 variety of diagnoses and challenging nursing
19 problems." She also -- I'm sorry. "She
20 assigns and directs four to five personnel
21 on a daily basis and works closely with them
22 in following the intent of the nursing care
23 plans for each patient.

24 "She also has rotated frequently to the
25 evening tour of duty where she is

1815
1 responsible for 85 patients and six
2 personnel on Building 16 while providing RN
3 coverage for Building 15 which involves 40
4 patients and 3-4 personnel. She shows good
5 judgment in decision making, is calm and
6 effective in emergency situations and is
7 always dependable in carrying out
8 assignments and reporting for duty as
9 scheduled.

10 "She keeps abreast of new nursing
11 trends by attending workshops wherever
12 possible and reading current periodicals and
13 nursing journals. She has the ability to
14 advance professionally and administratively
15 and I consider her a real asset to our
16 staff."

17 MR. HOWARD: Plaintiffs' Exhibit
18 21-15 dated 7-18-77, second page beginning
19 second line down at the end of that line,
20 "She plans, implements, and evaluates the
21 nursing care of intermediate-medical
22 patients and some of the most difficult
23 behavioral problems in the hospital."

24 Going further down on that page, "is

25 dependable and extremely fair and honest in
1816

1 her approach in dealings with the staff
2 personnel, patients, and relatives."

3 MR. OHLEMEYER: From the same
4 exhibit, Your Honor, dated July 18, 1977,
5 "Mrs. Wiley has been assigned primarily to
6 16A, which has the capacity of 19 patients.
7 She is innovative in planning group
8 activities for patients on the ward and
9 outside in the yard. She has been
10 instrumental in arranging for some
11 occupational therapy being carried out on
12 the ward for patients who are unable to go
13 to the clinic. She is willing, and does
14 rotate to other tours of duty as needed.

15 "Mrs. Wiley is astute in judging
16 performance and evaluating personnel who
17 work with her and is able to deal with them
18 in such a way that she gets the best
19 performance from them.

20 "Mrs. Wiley keeps abreast of new trends
21 in nursing by attending workshops, reading
22 current publications, and attending
23 in-service programs. She has always been
24 willing to share information with the staff.

25 "She is dependable and extremely fair
1817

1 and honest in her approach in dealings with
2 the staff personnel, patients, and
3 relatives.

4 "Mrs. Wiley is a real asset to our
5 staff." Signed again by Jane McCuan,
6 position, head nurse.

7 MR. HOWARD: Plaintiffs' Exhibit
8 21-16, second page next to the bottom line,
9 "She is a very conscientious and dedicated
10 nurse."

11 MR. OHLEMEYER: From the same
12 exhibit, Your Honor, "Mrs. Wiley continues
13 to perform at a high level. She plans and
14 organizes her work well in the patient care
15 on 16A. She has been selected as building
16 Safety Coordinator for Building 16 and has
17 done a good job in her inspection and
18 in-service. She works well with other
19 disciplines and is well liked by patients
20 and personnel."

21 MR. HOWARD: Plaintiffs' Exhibit
22 21-17. Second page, first sentence, "Mrs.
23 Wiley is a very conscientious, dependable,
24 loyal employee." Middle of that paragraph,
25 "She and her staff planned a wedding and

1818
1 took charge of the reception for a patient's
2 daughter."

3 MR. OHLEMEYER: From the same
4 exhibit, Your Honor, "Mrs. Wiley has been
5 acting head nurse on several occasions and
6 follows through making decisions when
7 indicated. She has the responsibility of
8 being 'in charge' of 16A and the ward runs
9 quite effectively. She does on the spot

10 teaching and uses every opportunity to
11 expand her personnel's knowledge. She works
12 well with other services to coordinate
13 patients' activities. Mrs. Wiley is a very
14 dedicated nurse and a great asset to our
15 nursing team. I wish to retain her on
16 B.16." Signed by Linda Caron, position, head
17 nurse, July 2, 1975.

18 MR. HOWARD: Plaintiffs' Exhibit
19 21-18. Second page, last sentence. "She is
20 well liked by her co-workers and is an asset
21 to our nursing team." Dated July 5, 1974.

22 MR. OHLEMEYER: Signed by Linda
23 Caron, position, head nurse. "Mrs. Wiley
24 has been under my supervision for about one
25 year now. In that year she has supported

1819

1 new programs or ideas we have tried. She is
2 quick to note and report change in patients'
3 conditions. She reacts quickly and
4 efficiently in emergencies. She is a most
5 professional acting nurse. She has adjusted
6 quickly to hospital nursing after being out
7 of it for some time. Mrs. Wiley is doing
8 counselings as indicated on personnel under
9 her supervision. She does on the spot
10 teaching and in-service. She is well liked
11 by her co-workers and is an asset to our
12 nursing team."

13 MR. HOWARD: Plaintiffs' Exhibit
14 21-22 numbered paragraph 2 about midway
15 through. She is -- I thought they were
16 running an advertisement there, Judge.

17 21-22, middle of the second numbered
18 paragraph. "She is outstanding in her
19 loyalty and support to the mission of
20 nursing service and hospital medical
21 program. For example, when we had a 25-year
22 old acute psychiatric patient admitted under
23 court order against our director, in a
24 maximum security situation, she displayed
25 such concern, integrity, and interest in

1820

1 helping plan the most therapeutic treatment
2 program possible under the existing
3 circumstances. The chief of psychiatry
4 service at that time stated that the reason
5 the patient became well enough for discharge
6 was due to positive personal relationships
7 he made while on Building 16A."

8 In paragraph No. 3, the last sentence,
9 "Under her leadership several of the
10 patients have shown great improvements."

11 Paragraph 5. "Mrs. Wiley recognizes
12 the importance of family involvement in
13 patient care. She uses a good approach with
14 patients and families readily gaining their
15 respect and confidence."

16 That's dated November 17, 1975, to
17 Nurse Professional Standards Board from head
18 nurse, Building 16.

19 MR. OHLEMEYER: In paragraph 7 of
20 that exhibit, Your Honor, reads, "Mrs. Wiley

21 does an outstanding job as leader of her
22 team on 16A. Some of her nursing assistants
23 have been here several years and are
24 somewhat hesitant to initiate new programs.
25 She is able to implement these changes and

1821

1 gain the respect of the personnel with whom
2 she works."

3 MR. HOWARD: Plaintiffs' Exhibit
4 21-45. Preemployment physical, 7-9-73.
5 Employment physical SSAN: 403-40-7537.
6 Mildred S. Wiley. "This is a healthy
7 chest."

8 21-52, Mildred S. Wiley, center of the
9 page, 1975, "Annual chest X-ray report,
10 normal chest." W.J. Comeau, M.D.

11 Plaintiffs' Exhibit 21-50, Mildred E.
12 Wiley, 403-40-7537, date of request,
13 8-23-79. In the center of the page,
14 "impression: Normal chest."

15 That's signed by James C. Camarata,
16 M.D.

17 Plaintiffs' Exhibit 21-51. Mildred E.
18 Wiley, date of request, 9-14-81. Center of
19 the page, "Impression: Normal chest."
20 Signed by or initialed by W.J. Comeau, M.D.

21 Plaintiffs' Exhibit 21-48, dated
22 4-7-91, "Employee Education Training and
23 Incentive Awards Record."

24 THE COURT: How many more do you
25 intend to refer to?

1822

1 MR. HOWARD: Judge, I have probably
2 ten more, and then I have several to show on
3 the Elmo and a tax return, so I'll probably
4 be another 10 or 15 minutes.

5 THE COURT: We'll take the noon
6 break at this point, ladies and gentlemen.
7 Just leave your exhibits on the chair. That
8 will be fine. We'll break until 2:30. They
9 tell me lunch is here ready to eat.

10 (Standard admonition)

11 MR. CASSELL: All rise.

12 THE COURT: Jury is not now
13 present. Mr. Motley?

14 MR. MOTLEY: Yes, Your Honor. I'd
15 like to raise two issues with Your Honor.
16 One is a witness matter and the other
17 relates to Dr. Roggli. We would like the
18 Court's permission of a lifting of the order
19 that prohibits destructive testing. We wish
20 to do a tissue analysis of what's called an
21 asbestos fiber burden analysis on the tissue
22 of Ms. Wiley and then utilize that in this
23 case since they raised that issue. And I
24 think Your Honor, that it's not anything --
25 both sides could do those tests from the

1823

1 same block. We have obviously no objection
2 to them having their pathologist or even
3 somebody else do so if they so wish. But
4 since they raise this issue of the fiber
5 burden and the ability to do such a test, we

6 seek leave of the Court to do it.

7 The second issue deals with Dr. Julius
8 Richmond who is the former Surgeon General
9 of the United States of America who we had
10 listed by deposition, but we advised him
11 last week we intended to bring him in person
12 to testify, and I believe Mr. Ohlemeyer told
13 me they would have an objection to that.
14 Obviously, I didn't want to fly him all the
15 way out here from Boston if Your Honor is
16 persuaded they're correct. I'm prepared to
17 argue that after lunch or whenever you want
18 to. I just wanted to bring those to your
19 attention.

20 THE COURT: Is there an objection
21 to that witness, Counselor?

22 MR. OHLEMEYER: Yes, there is, Your
23 Honor. He's not on their witness list. The
24 transcript of his deposition was contained
25 on the list of 140 depositions the

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1 plaintiffs filed as a supplemental exhibit
2 list, so I never had to make a decision as
3 to whether or if I should depose
4 Dr. Richmond in this case. He was never
5 listed as a witness.

6 They have a deposition transcript that
7 they have suggested to the Court and to
8 counsel in pretrial filings that they wanted
9 to use in this case. And I assume there
10 will be some objections to portions of that
11 testimony, and I assume there is
12 cross-examination of that testimony that can
13 be played. But at this point I object to
14 bringing a live witness who was known to the
15 plaintiffs' lawyers who was available to the
16 plaintiffs' lawyers at the time they filed
17 their witness list but not included on their
18 witness list.

19 With respect to the first issue, the
20 asbestos issue, I think, Your Honor, that is
21 even a more egregious request from
22 plaintiffs' counsel. Dr. Roggli has been
23 identified -- there is no dispute in this
24 case that Dr. Roggli has written a textbook
25 on how to do that analysis. There is no

1825

1 dispute in this case that Dr. Roggli was
2 identified as an expert in this case by the
3 plaintiffs' lawyers as early as February of
4 1995 when he wrote them his letter
5 describing his opinions in the case.
6 Dr. Kocoshis suggested to Dr. Turner as
7 early as 1993 that that kind of analysis
8 might be helpful in a case like this.

9 And quite frankly, the plaintiffs have
10 the burden of proof in this case, and
11 they've brought doctors in here and they
12 will bring doctors in here to tell you that
13 they have opinions about the cause of this
14 woman's disease. And if the plaintiffs'
15 lawyers and Dr. Roggli thought that was
16 something that was necessary in order to

17 form an opinion about the cause of Mrs.
18 Wiley's disease, they had the time, they had
19 the ability, and they had the opportunity to
20 do it before trial.

21 So I don't think in the middle of
22 trial, once again at 1:30, now we're on
23 lawyer time, not jury time, the plaintiffs'
24 lawyers are asking you to reopen the
25 evidence and change their case. This is the

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1 case they have decided to try. They ought
2 to try it. If they don't like the case, or
3 they don't like things that are going on in
4 the case, that's just part of what being a
5 lawyer and preparing a case and putting
6 evidence on requires. But I don't think,
7 Your Honor, there is any reason at this
8 point to open this up to a situation where
9 now they want an expert to do a test, we
10 might want an expert to do a test, and we've
11 got to put evidence on about what the tests
12 mean when they could have done all of this
13 before trial. If they thought it was
14 important, they should have.

15 MR. MOTLEY: Your Honor, that's an
16 amazing statement by Mr. Ohlemeyer, given
17 the fact that the blocks were lost in this
18 case before Dr. Roggli's test was done, and
19 Your Honor issued an order in 1995
20 prohibiting, precluding any destructive
21 tissue analysis. We couldn't do that after
22 Your Honor's order. They've chosen to raise
23 that to some kind of occult issue in this
24 case, and I don't think, Your Honor, in the
25 order of fairness in this matter that that

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1 should be left out there for the jury to
2 speculate about.

3 With respect to Dr. Richmond, he was
4 listed as a witness. I don't know what a
5 deposition list is other than a witness
6 list. He was unable to testify at this
7 trial. We finally persuaded him to do it.
8 He is not a witness on the issues of any --
9 let me restate that. He is a percipient
10 witness, Your Honor, on what these cigarette
11 companies did and did not do when he was the
12 Surgeon General of the United States. He is
13 not in here to offer opinions on causation
14 specific to her or anything of that kind.
15 Dr. Richmond was a Surgeon General of the
16 United States. He has been -- it's not a
17 deposition. He misspeaks. It's a trial
18 transcript of an environmental tobacco smoke
19 case where Mr. Ohlemeyer's partner was
20 there. They took a lengthy deposition and
21 Mr. Ohlemeyer's partner cross-examined him
22 in the trial just in the last six months.
23 In the Broin case which was a flight
24 attendants case in Miami. So he has been on
25 our witness list just by reason of the trial

1828

1 testimony in the Broin case.

2 We were only recently able to persuade
3 him to come to court.

4 THE COURT: When do you intend to
5 call him, Counsel?

6 MR. MOTLEY: I think he was
7 intended to, Judge -- I'll find that out
8 during lunch. I was under the impression it
9 was Thursday, but I'll find out for sure.

10 THE COURT: Tell me again,
11 Counselor, why the wait on the testing.

12 MR. MOTLEY: Your Honor, I'm going
13 to have to let Mr. Riley or Mr. Patrick,
14 because I don't want to miscite the dates.
15 Can I ask one of them to respond to Your
16 Honor about when the block was lost and all
17 that?

18 MR. OHLEMEYER: Your Honor, not to
19 interrupt, but let me, in the interest of
20 accuracy, not fairness, say two things about
21 what Mr. Motley just said. The order that
22 you entered that prohibited destructive
23 testing was an order that was requested by
24 the plaintiffs. There has been destructive
25 testing in this case, and it has been by the

1829

1 agreement of the parties. With Dr. Cagle,
2 they asked us, there is an order that
3 prevents us from doing this, do you have an
4 objection to it? We said we have an
5 objection unless you do this, this, and
6 this. And they did that. And we didn't
7 involve the Court in that because we worked
8 it out without wasting the time. So that
9 procedure has been in place since day 1, and
10 it was utilized by these lawyers.

11 The second point, in accuracy or
12 fairness, is Julius Richmond is not on their
13 witness list. I defy them to show you a
14 witness list where his name appears.

15 THE COURT: Thank you.

16 MR. MOTLEY: What is a deposition
17 list?

18 THE COURT: Who is going to speak
19 to the testing?

20 MR. MOTLEY: I think they're
21 getting the dates together, Your Honor.

22 MR. PATRICK: Your Honor, Charles
23 Patrick on behalf of the plaintiffs. My
24 understanding is that Dr. Roggli's original
25 report was issued in February of 1995. At

1830

1 that time, for whatever reason, the tissue
2 blocks had been misplaced by the hospital,
3 and we did not have access to that for him
4 to do the destructive testing or the
5 asbestos fiber analysis.

6 You entered an order in March of 1995
7 requiring agreement of the parties in order
8 to do such destructive testing at some point
9 thereafter, and we'll have to establish the
10 date. The tissue blocks were then found and
11 identified. And Mr. Ohlemeyer is correct
12 that we did have agreement of the parties as

13 far as Dr. Cagle's experimentation is
14 concerned, but the issue of the asbestos was
15 brought up in the cross-examination of
16 Dr. Roggli and put into issue in this case
17 by the defendants.

18 So at this point it seems that it would
19 be a proper matter for rebuttal to be able
20 to put Dr. Roggli on and to say -- for him
21 to testify that yes, I've gone to that extra
22 step. I've looked at the tissue for
23 asbestos bodies, did not see any, but I've
24 gone that extra step and I've looked at the
25 tissue under the electron microscope, and I
1831

1 can't find levels of asbestos that are
2 anything other than what someone off the
3 street may have as opposed to someone who
4 may be exposed to asbestos beyond
5 background.

6 THE COURT: You said rebuttal. Are
7 you telling me you want to recall the doctor
8 in your case in chief?

9 MR. MOTLEY: Or in rebuttal, Your
10 Honor. We just need to do the test and give
11 them an opportunity to look at the results
12 and take his deposition or have him test it
13 himself, rather than wait until our case is
14 over, and then they would have this
15 timeliness issue they've raised.

16 MR. OHLEMEYER: May I speak to
17 that? It's not proper rebuttal. Just
18 because he gets cross-examined and just
19 because we can point out there are things he
20 might have considered or considered and
21 ruled out in forming an opinion doesn't mean
22 they can bring him back in rebuttal to say
23 now I've considered them.

24 They've put this man who is an expert
25 who has an opinion about the cause of her
1832

1 disease. Whether we can test that opinion
2 on cross-examination doesn't open the door
3 from rebuttal from that same expert. That
4 matter is their case in chief. Rebuttal is
5 new matter. Rebuttal is factual, quite
6 frankly, it's not more opinions from the
7 same witness.

8 MR. MOTLEY: We're glad to bring
9 him as the last witness in our case in
10 chief.

11 MR. OHLEMEYER: You brought him
12 once and we cross-examined him and it took a
13 day and a half. If you don't like his
14 answers, you've got to live with them.

15 THE COURT: I want to tell
16 everybody this one time and one time only.
17 There will be no more conversation among the
18 lawyers. If you have a comment, make it to
19 me.

20 MR. OHLEMEYER: I apologize, Your
21 Honor.

22 THE COURT: Mr. Wagner.

23 MR. WAGNER: This is a calm

24 comment. We've been sitting here in this
25 courtroom now for several days, and there is

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1 hardly a day that has ever gone by that we
2 haven't been and the Court hasn't been
3 approached to do something that I've never
4 seen before. I've never seen lawyers in the
5 middle of a case want to do more discovery.
6 I've never seen lawyers in the middle of a
7 case want to do testing that would distract
8 us all from the trial of this case.

9 I would respectfully like to suggest
10 that we need to try this case, we need to
11 try it as it was prepared and presented
12 before the first day of trial in accordance
13 with your order, discovery orders, and get
14 on with the trial of this case. If we
15 don't, Judge, I'm going to sell my March
16 15th vacation tickets.

17 MR. MOTLEY: We have no objection
18 if Mr. Wagner wants to leave on March 15th
19 if we're not through with trial.

20 THE COURT: All right. At this
21 point my thought is to deny the request for
22 destructive testing. However, I don't see a
23 problem with calling the Surgeon General in
24 as a live witness. I will direct that
25 plaintiffs make him available for

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1 consultation with Counsel at least for an
2 hour prior to his testimony.

3 We'll break for 45 minutes, Counsel.
4 (The hearing was recessed for lunch.)

5 MR. CASSELL: All rise.

6 THE COURT: Be seated. Jury back
7 in its entirety together with the
8 alternates.

9 We are reviewing certain exhibits,
10 Mr. Howard, you may continue.

11 MR. HOWARD: Good afternoon.

12 Your Honor, that concludes the exhibits
13 that were in the handout, but I'll have some
14 more here, and Plaintiffs would offer
15 Plaintiffs' Exhibit 21-42. That is a copy,
16 Your Honor, of this and we ask permission of
17 the Court to substitute that for this. Show
18 this to the jury.

19 THE COURT: Any objection to 21-42?

20 MR. OHLEMEYER: No, Your Honor.

21 THE COURT: All right. 21-42 will
22 be admitted.

23 (Plaintiffs' Exhibit(s) 21-42 received
24 in evidence.)

25 THE COURT: All right, Mr. Howard.

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1 MR. HOWARD: Your Honor, Plaintiffs
2 would now offer into evidence Plaintiffs'
3 Exhibits 17-2 through 17-8, and I have the
4 originals. We would request permission of
5 the Court to offer substitutes rather than
6 the original of the documents.

7 MR. OHLEMEYER: No objection, Your
8 Honor.

9 THE COURT: Plaintiffs' Exhibits
10 17-2 through 17-8 inclusive will be
11 admitted. Copies may be substituted.
12 (Plaintiffs' Exhibit(s) 17-2 through
13 17-8 received in evidence.)
14 MR. HOWARD: We would like to show
15 these on the monitor.
16 THE COURT: All right.
17 MR. HOWARD: For 17-2, 17-3, 17-4,
18 17-5, 17-6, 17-7, and 17-8.
19 Plaintiffs would now offer into
20 evidence Plaintiffs' Exhibits 26-1988F,
21 26-1989F, and 26-1990F.
22 MR. OHLEMEYER: No objection, Your
23 Honor.
24 THE COURT: 26-1988F, 26-1989F, and
25 26-1990F will be admitted.

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1 (Plaintiffs' Exhibit(s) 26-1988F,
2 26-1989F, 26-1990F received in evidence.)
3 MR. HOWARD: Thank you. Your
4 Honor, we have copies of those for each of
5 the jurors, and then I will highlight a
6 portion of that on the monitor.
7 THE COURT: We'll use the same
8 procedure in case defense wants to highlight
9 anything.
10 MR. HOWARD: Plaintiffs' Exhibit
11 26-1988F, page 1, Philip E. and Mildred E.
12 Wiley, 1988 tax return, line 7, wages,
13 salary, tips, \$54,720. Going to the last
14 page, Form W-2 wage and tax statement,
15 Mildred E. Wiley, \$35,375, 1988.
16 Plaintiffs' Exhibit 26-1989F, Philip E.
17 Wiley, Mildred E. Wiley, 1040 U.S.
18 Individual Income Tax Return, 1989, line 7,
19 \$57,527. Last page, W-2 wage and tax
20 statement, Mildred E. Wiley, 1989,
21 \$38,264.86.
22 Plaintiffs' Exhibit 26-1990F, 1040 U.S.
23 Individual Income Tax Return 1990, Philip E.
24 and Mildred E. Wiley, line 7, \$60,017. Last
25 page, Form W-2 wage and tax statement,

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1 Mildred E. Wiley, \$38,531.90.
2 Your Honor, that's all of the exhibits.
3 I don't know if the Court wants to allow the
4 jurors more time to look through the
5 documents or what, but that's all we have to
6 present at this time.
7 THE COURT: Just hand them down
8 then if you're finished. Bailiff will pick
9 them up.
10 Call your next, Mr. Howard.
11 MR. CROSS: If the Court please, I
12 will conduct the direct examination of the
13 next witness.
14 THE COURT: All right, Mr. Cross.
15 MR. CROSS: Mrs. Betty Hughes.
16 I'll ask the Court's indulgence while we
17 bring her from the other room.
18 THE COURT: Sure. Would you raise
19 your right hand.

20 PLAINTIFFS' WITNESS, BETTY HUGHES, SWORN
21 THE COURT: Would you have a seat
22 right there, please. Would you tell the
23 jury your name, ma'am?
24 THE WITNESS: Betty Hughes.
25 THE COURT: Spell your last name.
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1 THE WITNESS: H-U-G-H-E-S.
2 THE COURT: Thank you. Mr. Cross.
3 MR. CROSS: Thank you, Your Honor.

4 DIRECT EXAMINATION
5 BY MR. CROSS:

6 Q Mrs. Hughes, where do you live?
7 A In the country, actually, between [DELETED]
8
9 Q And that's in [DELETED]?
10 A Yes, it is.
11 Q And who lives with you there?
12 A My husband, Rex.
13 Q Are you employed at this time?
14 A No, I'm retired. I take it back. I do
15 answer the phone for my husband's business.
16 He does have a little business, so I answer
17 the phone.
18 Q Okay. Let me ask you a question, and I'm
19 going to remind you that you're under oath
20 so you have to answer truthfully. How old
21 are you?
22 A I'm 71.
23 Q When were you born?
24 A January 30, 1927.
25 Q Now, you have -- you do -- you perform the
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1 service of answering for your husband's
2 business?
3 A Yes, I do.
4 Q How old is your husband?
5 A 74.
6 Q What is his name?
7 A Rex.
8 Q When were you and Rex married?
9 A In 1985.
10 Q 1985?
11 A I'm sorry. 1981.
12 Q Okay. Are you a little nervous up there?
13 A Naturally, a little bit.
14 Q All right. Well, you just take deep breaths
15 and try to talk to the jury so they can hear
16 what you have to tell them today.
17 A All right.
18 Q Now, prior to your answering the telephone
19 for your husband's business, did you have a
20 career or profession?
21 A You mean since I retired?
22 Q No, since before that. Earlier in your
23 life, did you have a career?
24 A Before I went to the hospital?
25 Q Before you retired.

1840

1 A Before I retired, yes, I was a nurse at the
2 Marion VA Hospital.
3 Q How many years were you a nurse at the --
4 A I was there 30 years.

5 Q Let me ask you some questions about that.
6 Let's go back to, where were you born and
7 raised?
8 A In Grant County.
9 Q So you're a lifelong resident of [DELETED]
10
11 A Except when I was in nurse's training.
12 Q Okay. When did you go to nurse's training?
13 A In 1945.
14 Q And how long were you in training to be a
15 nurse?
16 A I was in the three-year diploma program from
17 1945 to 1948 and then to Indiana University
18 for my bachelor's degree, I think I
19 graduated in 1962.
20 Q So when did you become a licensed nurse?
21 A In 1948.
22 Q And that training, received -- have you
23 heard the phrase, capping of a nurse?
24 A Yes. I went through it.
25 Q Can you tell the jury what that involves.

1841

1 A This is a bright spot in a nurse's, student
2 nurse's life. We have satisfactorily, at
3 least at my hospital, it was six months
4 training, and then we have passed the
5 initial studies so we get our caps. We,
6 before that, did not have a cap on our head,
7 so the nurse's cap is placed on our head at
8 that time.
9 Q And does that make you an LPN or an RN?
10 A No, still a student nurse.
11 Q Okay. What's the next step in a nurse's
12 training and education after she receives
13 her cap?
14 A The day of graduation.
15 Q Okay. And what happens after that?
16 A Well, then you take a state board exam and
17 hopefully you pass it.
18 Q Okay. And if you do pass it, to what does
19 that entitle you?
20 A Then you're entitled to your RN.
21 Q Okay. And did you take such an exam,
22 Mrs. Hughes?
23 A Yes, I did, in Illinois.
24 Q So you were licensed as a registered nurse
25 in Illinois?

1842

1 A Yes.
2 Q Approximately when was that?
3 A 1948.
4 Q And where did you go to work after you
5 became a registered nurse?
6 A My first job was in the hospital where I
7 trained at Michael Reese.
8 Q How long were you there?
9 A I think possibly about four months.
10 Q And could you then tell the jury where you
11 went and where you worked and the kinds of
12 things you did up until the time you went to
13 the Marion VA Hospital.
14 A Okay. At that hospital, I worked on a
15 circumcision and tonsillectomy ward. I

16 would come in the morning and take care of
17 their children that had their tonsils out
18 and circumcisions. Then when they went
19 home, I made up the beds and made them ready
20 for the next day.

21 Then my next job was working in a
22 doctor's office, and I worked there for six
23 years. Family practitioner.

24 Q So you -- where was the doctor's office, the
25 family practitioner you worked for?

1843

1 A In Fairmount, Indiana.

2 Q Okay. And what was the name of that doctor?

3 A Actually I worked for two. I worked for one
4 for six weeks, Dr. Belshaw, then he moved
5 from Fairmount, and I worked for Dr. Dale
6 King.

7 Q And then you went from there to the
8 Veteran's Administration?

9 A Yes, I did.

10 Q Why did you take a job at the Veteran's
11 Administration from the one that you had
12 with the doctors in Fairmount?

13 A I felt like it would be a good place to use
14 my nursing skills.

15 Q And what year was it exactly that you went
16 to work at the Veteran's Administration?

17 A When I went to work?

18 Q Yes. What year was that?

19 A 1955.

20 Q Now, I want to go back in time to the time
21 that you were capped. Can you tell the jury
22 what the Nightingale pledge is?

23 A It's a pledge where we say that we will be
24 ethical in our nursing, that we will
25 consider the patient and will not do

1844

1 anything to hurt him but do everything to
2 try to help him that we can.

3 Q Do the patients -- I'm sorry. Do the
4 nursing students have to take this pledge at
5 any point in time in their education?

6 A The nursing assistants?

7 Q Yes.

8 A No.

9 Q And when did you first learn of the
10 Nightingale pledge?

11 A During my nurse's training.

12 Q And did you take that pledge?

13 A Yes, I did, at capping time.

14 Q Do you subscribe to that pledge today?

15 A Yes, I do.

16 MR. CROSS: May I approach the
17 bailiff, Your Honor?

18 THE COURT: Sure.

19 Q Mrs. Hughes, I'll hand you a document that's
20 been marked for identification as
21 Plaintiffs' Exhibit 22. And could I ask you
22 to identify for the Court and the jury what
23 is contained on that particular document?

24 A That is a copy of the Florence Nightingale
25 pledge.

1845

1 Q Who was Florence Nightingale?
2 A She was the one that was -- one of the
3 beginning nurses.
4 MR. CROSS: Your Honor, at this
5 time the plaintiffs would like to move into
6 evidence Plaintiffs' Exhibit 22.
7 MR. OHLEMEYER: No objection, Your
8 Honor.
9 THE COURT: 22 will be admitted.
10 (Plaintiffs' Exhibit(s) 22 received in
11 evidence.)
12 MR. CROSS: May I ask the Court for
13 permission to ask Mrs. Hughes to read that
14 document to the jury.
15 THE COURT: Would you read that to
16 the jury, please. "I solemnly pledge myself
17 before God, and in the presence of this
18 assembly, to pass my life in purity and to
19 practice my profession faithfully. I will
20 abstain from whatever is deleterious and
21 mischievous, and will not take or knowingly
22 administer any harmful drug. I will do all
23 in my power to maintain and elevate the
24 standard of my profession, and will hold in
25 confidence all personal matters committed to
1846
1 my keeping and all my family affairs coming
2 to my knowledge in the practice of my
3 profession. With loyalty I will endeavor to
4 aid the physician in his work, and devote
5 myself to the welfare of those committed to
6 my care."
7 Q And did you subscribe to that pledge at the
8 time of your capping ceremony?
9 A Yes, I did.
10 Q And during your 30 years as an active nurse,
11 did you follow that pledge to the best of
12 your abilities?
13 A Yes, I did.
14 Q Now, you have been active with a particular
15 group -- in fact, you attained an office
16 with that group at one point in time; isn't
17 that true?
18 A Yes.
19 Q Can you tell the jury the name of that group
20 you've been associated with?
21 A You're speaking about the American War
22 Mothers.
23 Q Yes. What exactly is the American War
24 Mothers?
25 A All the members of this organization
1847
1 currently have children or have had children
2 in the military.
3 Q All right.
4 A We do a lot of work with the veterans.
5 Q What kind of work do you do with the
6 veterans?
7 A We work both in the community and in
8 hospitals, volunteering with them mainly,
9 and we do help them sometimes with money,
10 things that they need.
11 Q Is this a local group or a regional group?

12 A It's a national group.
13 Q And how long have you been associated with
14 this particular group?
15 A Since the early '60s I believe.
16 Q And did you, in fact, attain an office in
17 this group?
18 A I was the national president for two years.
19 Q And did you attain any recognition for your
20 office holding as president of the National
21 War Mothers?
22 A Well, I got a Who's Who, got the plaque on
23 my birthday this year.
24 Q You've been mentioned in Who's Who?
25 A Yes.

1848

1 Q Okay. Now, since -- do you still -- you
2 retired from the VA in what year,
3 Mrs. Hughes?
4 A 1985.
5 Q And have you continued to have any
6 association with the Veteran's
7 Administration Hospital in Marion since your
8 time of your retirement?
9 A Yes, with the American War Mothers, I
10 usually volunteer about once a month out
11 there.
12 Q Now, from 1955 when you first went to the VA
13 Hospital to 1985 when you retired, was your
14 term of employment with that hospital
15 continuous?
16 A Yes, it was.
17 Q So you never took any year-long leave of
18 absences to go anywhere?
19 A No. No.
20 Q Let's go back to 1955 when you first assumed
21 employment in the Veteran's Administration.
22 What was the -- you were an RN at that time;
23 correct?
24 A Yes, I was.
25 Q And you had not yet had a bachelor's degree.

1849

1 I think you said you got your bachelor's
2 degree from Indiana in 1962?
3 A I believe it was '62.
4 Q Why, if you already had a job as an RN in a
5 hospital, government hospital, why would you
6 go take additional education?
7 A Well, I wanted to keep current, for one
8 thing. And also, we got a better salary.
9 We were in line for better positions if we
10 had more degrees.
11 Q How were you able to complete a bachelor's
12 degree at Indiana University if you were
13 maintaining a full-time job at the Veteran's
14 Administration Hospital?
15 A I went evenings and on my days off.
16 Q Where did you go?
17 A Indiana University.
18 Q At the Bloomington campus?
19 A At Bloomington, and a few classes in Marion
20 and a few classes in Indianapolis and
21 Kokomo.
22 Q So you would be driving to all these cities

23 at night?
24 A That's right.
25 Q After the end of your day?
1850
1 A That's right.
2 Q Now, in 1955, when you first went to the
3 Veteran's Administration Hospital as a
4 fairly new registered nurse, what was your
5 first job? What did they make you do the
6 first time you went there?
7 A I think the first building I was on, I was
8 with more or less geriatric patients.
9 Q And what did you do for them? What kinds of
10 things did you do?
11 MR. OHLEMEYER: Excuse me, Your
12 Honor, I don't mean to interrupt, but --
13 MR. CROSS: Then don't.
14 MR. OHLEMEYER: Excuse me,
15 Mr. Cross. I think this is irrelevant,
16 1955.
17 MR. CROSS: I'm building up the
18 foundation of this woman's knowledge and
19 expertise as a nurse to lay a foundation for
20 what she's going to testify to as to what
21 was common to all nurses during the relevant
22 years.
23 MR. OHLEMEYER: This witness is a
24 fact witness and a percipient fact witness.
25 THE COURT: All right. I'll hear a
1851
1 little more of it, Counselor. Go ahead.
2 A I'm sorry, what was the question?
3 Q What kinds of things did you do for these
4 people in the geriatric wards?
5 A I tried to motivate them to do as much for
6 themselves as they could. They were mainly
7 psychiatric and geriatric with some medical
8 problems, and we worked hard to try to
9 motivate them to want to help themselves in
10 self-care.
11 Q How long did you work in the geriatric wards
12 of the hospital?
13 A Possibly altogether, around 20 years.
14 Q So you went back to those wards from
15 different times?
16 A Yes, I did.
17 Q Did there come a time, Mrs. Hughes, when you
18 went to work in Building 16 of the Veteran's
19 Hospital?
20 A Yes.
21 Q When was that?
22 A I believe in 1957 I went over there first.
23 Q And in 1957, what kind of a ward was the
24 Building 16?
25 A At that time, it was an acute psychiatric
1852
1 ward. We had patients of various ages, and
2 it was the most acutely disturbed
3 psychiatric patients.
4 Q And what do you mean by acutely disturbed?
5 A I guess maybe nowadays they would be called
6 hyperactive, and we had suicidal patients
7 and various classifications.

8 Q And needless to say, these people were all
9 veterans, were they not?
10 A Yes, they were.
11 Q What was your particular job in Building 16,
12 which you first went there about 1957?
13 A I was there a short time as a staff nurse.
14 Then I became head nurse there.
15 Q Okay. Now, where was your office -- you
16 were -- let me ask you this: When did you
17 become head nurse, if you can recall?
18 A I think probably about 1958.
19 Q And what were your responsibilities as head
20 nurse in Building 16?
21 A It was my responsibility to see that all the
22 nursing service people, which included
23 nursing assistants, LPNs and RNs, motivated
24 the patients to help themselves as much as
25 possible. But at that time, we did not know

1853

1 about secondhand smoke.
2 MR. OHLEMEYER: Excuse me, Your
3 Honor. Move to strike the answer as
4 non-responsive. I'd ask the Court to
5 reconsider the objection to the relevance of
6 this witness as a fact witness, and this
7 time period has nothing to do with this
8 lawsuit.

9 THE COURT: Motion to strike will
10 be granted. The jury will disregard
11 everything after the witness said, "at that
12 time we did not know about," jury will
13 disregard that. Counselor, let's bring it
14 up to the relevant period here.

15 Now, ma'am, I just want you to answer
16 his questions.

17 Q You all right?

18 A I'm fine.

19 MR. CROSS: Okay. If the Court
20 please, there are a couple more questions
21 pertaining to this time period that I do
22 think have some significant relevance with
23 respect to her position as head nurse.

24 THE COURT: All right. Go ahead,
25 I'll hear them.

1854

1 MR. CROSS: Thank you.

2 Q Where was your office as head nurse?

3 A It was in the front of the building, and the
4 day room where the patients spent most of
5 their day was at the other end of the
6 building.

7 Q Later on that, the location of the head
8 nurse office was moved, was it not?

9 A Yes, it was.

10 Q Where was it changed to?

11 A It was changed to right at the edge of the
12 patient day room.

13 Q Now, when you were -- after you finished
14 being the -- strike that.

15 When did your time in Building 16
16 exclusively as the head nurse terminate?

17 When did that come about?

18 A About 1959.

19 Q And what did you do after that, at the VA
20 Hospital?
21 A I went to another building as head nurse,
22 and then later on I went to nursing
23 education, and then after I came back as a
24 staff nurse.
25 Q Okay. So when did you go into nursing
1855
1 education?
2 A In 1962.
3 Q And from -- and how many years did you serve
4 in the area of nursing education?
5 A Fifteen years.
6 Q And during -- so that would be 1962 to 1977?
7 A Yes.
8 Q During that time period, 1962 to 1977, did
9 you have occasion to visit Building 16?
10 A Yes, I did. I had -- excuse me.
11 Q How frequently would you have reason?
12 A When I had students there, I usually spent
13 every part of every day that the students
14 were there.
15 Q Every single day you were in Building 16?
16 A Yes. Not the full day. I wasn't there the
17 full day. I was there part of the day.
18 Q I understand, but you did have occasion to
19 be in there from time to time?
20 A Yes.
21 Q Did you have occasion to go into any other
22 buildings during that 15-year period?
23 A I was on every patient building.
24 Q Every building?
25 A Yes.

1856
1 Q All right. And did you have occasion to go
2 to different shifts of the day?
3 A During the 30 years that I was there, I
4 worked all three tours on every building.
5 Q All three tours every building?
6 A Yes. Yes.
7 Q Drawing, with specific reference from the
8 period that you were in nursing education,
9 1962 to 1977, then I think you said you went
10 to become a staff nurse after that?
11 A Yes.
12 Q Okay. So would that be from 1977 to 1985
13 you were staff nurse?
14 A That's correct. That's correct.
15 Q Did you have occasion during those last
16 eight years at the VA Hospital to travel to
17 different buildings?
18 A Occasionally, but most of the time I spent
19 on one particular unit at that time.
20 Q Okay. And did those units change from time
21 to time, different buildings, different
22 shifts, different times?
23 A Yes. They changed both patients and then
24 the construction of the buildings changed
25 several times during the time I was there.

1857
1 Q Now, I want to ask you, during the time
2 period that you were there, okay, the time
3 you were involved in nursing education in

4 particular, the 15 years when you were
5 travelling all over the VA Hospital, did you
6 have occasion to observe whether there was
7 smoking taking place in the various
8 buildings?

9 A Yes, I did.

10 Q Did you have personal knowledge of this?

11 A Yes, I did.

12 Q You observed it with your very own eyes?

13 A Yes, I did.

14 Q Now, with particular reference to Building
15 16, was smoking -- during the years 1962 to
16 1977, when you were in there virtually every
17 day, did you notice that the condition was
18 any different than it was when the time you
19 were head nurse?

20 MR. OHLEMEYER: Your Honor, object
21 to the question as being leading,
22 argumentative, and the question --

23 THE COURT: Question is leading.
24 Rephrase that, Counselor.

25 MR. CROSS: I will be glad to, Your
1858

1 Honor.

2 Q Drawing your attention to the time period
3 you were in the nursing education function
4 of the hospital, all right?

5 A Yes.

6 Q Those the same years being 1962 to 1977,
7 what did you notice about the prevalence of
8 smoking in Building 16 as it related to the
9 way it was when you were head nurse?

10 MR. OHLEMEYER: Objection, Your
11 Honor. It lacks relevance during time
12 periods where Mrs. Wiley didn't work at the
13 hospital or wasn't in the building and lacks
14 foundation as to when this witness was in
15 the building with Mrs. Wiley.

16 MR. CROSS: It establishes --

17 THE COURT: Overruled. You can
18 answer that question, ma'am.

19 THE WITNESS: Would you please
20 repeat it?

21 Q I will try. Mrs. Hughes, during the time
22 that you were involved in the nursing
23 education programs at the Veteran's
24 Administration Hospital, what was -- what
25 can you say about the relationship of the
1859

1 smoking that you observed during those years
2 versus the time when you were head nurse?

3 A It was still pretty bad, the smoke in the
4 entire building.

5 Q And can you tell the jury what it was like
6 during the time you were doing nursing
7 education?

8 MR. OHLEMEYER: Same objection,
9 Your Honor. The question is --

10 THE COURT: Objection is noted and
11 overruled. Except make your question more
12 specific. What it was like, what was what
13 like?

14 MR. CROSS: All right.

15 Q How would you describe the amount of smoke
16 that was present in the first floor of
17 Building 16 in the years in the later '70s.
18 A In the later '70s, there was a lot of smoke
19 all over the building.
20 Q All over the building?
21 A All over the building, including the nurse's
22 office.
23 Q Did the nurses smoke?
24 A Yes.
25 Q Patients smoke?

1860

1 A Yes.
2 Q Did patients in the day room smoke?
3 A Yes, they did.
4 Q Did the smoke ever go away during the day?
5 A Never.
6 Q And if you went into an office and closed
7 the door, would the smoke go away then?
8 A No. It still penetrated.
9 Q Did you have any air conditioning in your
10 office?
11 A Not at the time I was head nurse, I don't
12 believe.
13 Q You did have occasion during those years to
14 see how much smoke there was in other
15 buildings of the VA Hospital; is that
16 correct?
17 A Yes, I did.
18 Q How would you describe the extent of the
19 amount, rather, the amount of the smoke that
20 was present in the other buildings of the VA
21 Hospital with that which was in Building 16?
22 A They were all bad, but 16 was particularly
23 bad, I thought.
24 Q Based on your observations of the others?
25 A Yes. Yes.

1861

1 Q I believe there's been some testimony and
2 some statements made during the course of
3 this trial that a lot of the patients who
4 were in Building 16 were particularly
5 physically disabled. Do you recall that
6 being true?
7 A That's true.
8 Q And were there people who were paralyzed in
9 those buildings?
10 A Yes. We had many post-stroke patients.
11 Q And did these people smoke?
12 A Some of them, yes.
13 Q How could they smoke if they were paralyzed
14 or post-stroke?
15 A They were assisted.
16 Q Who assisted them?
17 A Usually it was nursing service person. Once
18 in a while it would be somebody from another
19 department, but usually nursing service.
20 Q Did you see this happen with your own eyes?
21 A Yes. I did. Yes, I did.
22 Q And could you tell the jury exactly what
23 they would do, how they would assist these
24 people?
25 A Depended on the ability of the patient to

1 help himself, but we might even have to hold
2 the cigarette in his mouth for him.
3 Q Because of why? Why would you have to do
4 that?
5 A Because they were unable to do this
6 themselves, to hold the cigarette
7 themselves.
8 Q What was -- let's go back to the education
9 function that you performed. Beginning in
10 1962, when you started to become an
11 educator, is that a proper word, educator?
12 A Nursing instructor is the term they used.
13 Q Nursing instructor. Who would you be
14 instructing?
15 A Who would I be instructing?
16 Q Yes, ma'am.
17 A Nursing assistants, and I had a basic course
18 for them. And then sometimes we had ongoing
19 education, and I provided orientation
20 programs for LPNs and RNs also, new people.
21 Q So there were basically three different
22 types of educational programs that you
23 administered?
24 A Yes. Yes. And we even had various levels
25 of nursing assistants. We had what we

1 called an advanced class, in addition to
2 their orientation period.
3 Q What is a nursing assistant as opposed to a
4 registered nurse?
5 A They don't have an RN or LPN but they do a
6 lot of good work.
7 Q They just don't have --
8 A They assist the patients. They give them
9 personal care like bathing, assist them in
10 brushing their teeth, combing their hair,
11 personal hygiene.
12 Q The nursing assistants would also help in
13 the patients smoking?
14 A Yes, and they would have activities with
15 them to try to motivate them in addition to
16 the personal care.
17 Q So you trained nursing assistants, you gave
18 orientation courses to new nurses at the
19 hospital, and you also did continuing
20 education of a sort to these people?
21 A Yes.
22 Q What kinds of things would you do in the
23 continuing education courses?
24 A In the advanced classes, for example, we
25 might teach catheterization, respiratory

1 things like helping with gastro problems and
2 this type of thing.
3 Q Now, did you conduct these continuing
4 education courses up until the time that you
5 became the staff nurse in the late '70s?
6 A Yes, I did.
7 Q When you -- let me ask you this: Was there
8 anywhere in the Veteran's Administration
9 Hospital where smoking was not permitted?
10 A In the olden days, I should say when I first

11 went out there, smoking was permitted
12 anywhere except in the patients' bedrooms
13 and in the chapel.
14 Q Why wasn't smoking permitted in the
15 patients' bedrooms?
16 A Could have been a hazard. Could have been a
17 fire hazard.
18 Q So it wasn't concern about whether smoking
19 was --
20 A No.
21 Q So was there anytime of the day -- let me
22 ask you that way: What part of the day,
23 while you were involved in nursing
24 education, especially in the late 1970s,
25 would you be in a position not to be

1865

1 surrounded by secondhand smoke?
2 MR. OHLEMEYER: Objection, Your
3 Honor, relevance.
4 MR. CROSS: It's extremely
5 relevant, your Honor. It's probative.
6 MR. WAGNER: It's also prejudicial
7 to frame questions like "surrounded by
8 secondhand smoke." We need to have more
9 precise time frame as to these questions.
10 THE COURT: I agree. Make your
11 question more specific.
12 Q Drawing your attention, again, I'm talking
13 towards the end of your tenure in the
14 nursing education.
15 A Yes.
16 Q In particular, that would be the late 1970s.
17 Correct?
18 A Yes. Until '77.
19 Q 1977. In 1977, on a typical day, would
20 there be anytime during the course of that
21 day, or tell the jury what, how much of that
22 particular day, would you not be exposed to
23 secondhand smoke?
24 MR. WAGNER: Your Honor --
25 A I would be exposed all day long.

1866

1 MR. WAGNER: Just a moment. First
2 let me make my objection, Your Honor. It's
3 not relevant unless it's somehow connected
4 to what Mrs. Wiley may have been doing or
5 was someplace in the vicinity. All we have
6 is this witness' testimony about what her
7 experiences were, and those are not
8 necessarily germane or connected to
9 Mrs. Wiley's personal experience.
10 THE COURT: I think that goes to
11 the weight. Overruled.
12 You can answer -- did you understand
13 the question?
14 THE WITNESS: I'm not sure at this
15 point.
16 THE COURT: The question was in the
17 late '70s, was there a time when you, you
18 yourself were not exposed to smoke.
19 THE WITNESS: That's right. I was
20 exposed the entire day.
21 Q Again, from the time period that you were at

22 the Veteran's Administration Hospital, I'll
23 just take the whole 30 years, was there ever
24 a time that you can recall that Building 16
25 did not have smoke in it when you were
1867

1 there?

2 A Smoke what?

3 Q Was there ever a time that Building 16 did
4 not have smoke in it when you were there?

5 MR. OHLEMEYER: Same objection,
6 Your Honor.

7 A No. It was always there, and we were not
8 aware of secondhand smoke.

9 Q All right.

10 THE COURT: Objection is overruled.
11 Mr. Wagner.

12 MR. WAGNER: Move the answer go
13 out, Your Honor.

14 THE COURT: Motion to strike is
15 denied.

16 Q Now, was there ever -- was there ever a day
17 during the entire time you worked at the
18 Veteran's Administration Hospital,
19 Mrs. Hughes, that you did not -- that you
20 were not exposed to secondhand smoke at all?

21 MR. OHLEMEYER: Same objection,
22 Your Honor.

23 THE COURT: I think she answered
24 that question, Counsel.

25 MR. CROSS: I was going to just
1868

1 Building 16.

2 THE COURT: I thought she answered
3 that.

4 MR. CROSS: Okay. I'll move on.

5 THE COURT: All right.

6 Q When you went home at night, when you went
7 home at night, Mrs. Hughes, what, if any,
8 reminders of your day at work did you take
9 home with you?

10 A I was completely saturated with smoke.

11 MR. WAGNER: Objection, Your Honor.

12 THE COURT: Ma'am, let me tell you,
13 when there is an objection, I want you to
14 stop.

15 THE WITNESS: Oh, I'm sorry.

16 MR. WAGNER: Objection, your Honor.
17 Again, this is irrelevant as to this woman's
18 experiences that aren't connected up to
19 Mrs. Wiley, and I know where this is going,
20 and I think Your Honor does too, so we
21 object for that reason.

22 MR. CROSS: May I respond, Your
23 Honor? Your Honor, the evidence is already
24 established that Mrs. Hughes was in the same
25 building that Mrs. Wiley was during the same
1869

1 period of time; she was exposed to the same
2 secondhand smoke Mrs. Wiley was. I think
3 it's perfectly legitimate, probative to
4 explore those issues.

5 I might also ask -- inform the Court,
6 Mrs. Hughes has a little difficulty in

7 hearing, so she may not be able to hear that
8 there is an objection going on.
9 THE COURT: I'm going to overrule
10 the last objection. You may answer the last
11 question.
12 THE WITNESS: Would you repeat it,
13 please?
14 MR. CROSS: I've lost my train of
15 thought. Do I approach the reporter?
16 THE COURT: The question was, when
17 you got home from work, during the late
18 '70s, did you have any -- his word -- of
19 the smoke in the building?
20 A Yes, I did. I could smell it in my hair,
21 through my clothes.
22 Q And was that true every day until you
23 retired in 1985?
24 A Yes, it was. From the day I went to the
25 hospital till the day I left.

1870

1 Q Did you find the secondhand smoke offensive?
2 MR. WAGNER: Your Honor, objection
3 as to what this witness' reactions were.
4 Now we're really getting far afield, it
5 seems to me.
6 THE COURT: I agree. Sustained.
7 Q During the time that you worked there
8 from -- let's take the relevant period 1973
9 to the time you retired in 1985, did you
10 ever make any complaints to anyone about the
11 condition of smoke in the buildings at the
12 VA Hospital?
13 A Not really.
14 Q Why didn't you make any complaints?
15 MR. WAGNER: Objection, Your Honor.
16 THE COURT: You can answer that,
17 ma'am. The objection is overruled. You may
18 answer that.
19 A Okay. I did not know about secondhand smoke
20 at that time, and I needed a job, so I put
21 up with it.
22 Q Was there any other place in the Veteran's
23 Administration Hospital you could have gone
24 to and not been exposed to secondhand smoke?
25 MR. WAGNER: Your Honor --

1871

1 A No.
2 MR. CROSS: Just a minute.
3 MR. WAGNER: Objection. No time;
4 no specific reference.
5 THE COURT: Fix a time, Counselor.
6 MR. CROSS: Between the years 1973
7 to your retirement in 1985.
8 A No.
9 THE COURT: All right. Objection
10 is overruled.
11 Q Do you know of any other hospital that you
12 could have gone to work as a nurse and not
13 been exposed to secondhand smoke during the
14 years 1973 to 1985?
15 MR. WAGNER: Objection. Objection,
16 Your Honor, irrelevant, no foundation.
17 THE COURT: The objection is

18 sustained. You do not have to answer that.
19 Q Mrs. Hughes, there has been some testimony
20 from Mr. Wiley in this case that his wife
21 was a member of a safety committee. Are you
22 familiar with the safety committee?
23 A Yes, I am. I was on it at one time.
24 Q What is the safety committee?
25 A This was a committee consisting of people

1872

1 from different departments of the hospital,
2 and we met to discuss issues that would
3 affect safety. And secondhand smoke was
4 never mentioned in this.

5 Q What was the --

6 MR. WAGNER: Your Honor, move the
7 answer go out. I mean --

8 THE COURT: The last part of her
9 answer regarding secondhand smoke will go
10 out; jury will disregard.

11 Now, ma'am, all I want you to do is
12 answer his questions. Don't volunteer
13 anything. Just answer what he asks. He
14 asked you what the safety committee was.
15 Now, tell us again what the safety committee
16 was.

17 A This is a committee that was concerned about
18 safety of the patients and of personnel.
19 And it consisted of members from -- people
20 from different departments were on it.

21 Q And when approximately were you on the
22 safety committee?

23 A I think about 19- -- in the late '70s.

24 Q And did the issue of patients smoking ever
25 come up during the context of the safety

1873

1 committee meeting?

2 A No, it didn't.

3 Q And as a consequence of any of these safety
4 committee meetings, was there ever a change
5 carried out in the policy towards smoking at
6 the Veteran's Administration Hospital?

7 A It wasn't that I recall.

8 MR. OHLEMEYER: Objection, Your
9 Honor. Lack of foundation.

10 MR. MOTLEY: Can we be heard on
11 that?

12 THE COURT: There's no foundation
13 yet. That objection is sustained.

14 Q Did you know, Mrs. Wiley?

15 A Yes, I did.

16 Q How did you come to know Mrs. Wiley?

17 A I met her on the ward. I had students
18 there, but I also saw her a few other times
19 other than when I had the students there.
20 Like when I would take information to the
21 building or something for the nurses to
22 have.

23 Q I think there's been some testimony that
24 Mrs. Wiley began her career at the Veteran's
25 Hospital in 1937 and worked until the time

1874

1 of her death which was long after you
2 retired. How often during that time span

3 would you have had occasion to make her
4 acquaintance or talk to her in any given
5 day?
6 A When I was in the building with the
7 students, I would have a chance to contact
8 her.
9 Q And this was the time period which you were
10 talking -- when you were coming to Building
11 16 every day?
12 A Yes.
13 Q So you would have seen -- during the time
14 you were in nursing education, you would
15 have seen Mrs. Wiley every day that she was
16 there?
17 A Every day that I had students there.
18 Q And did you become friendly with her?
19 A Yes, I did.
20 Q Can you tell the jury what kind of a nurse
21 she was to your observation?
22 A She was very compassionate, very concerned
23 about the patients and in getting them to do
24 as much for themselves as they could.
25 Q And when you saw her, would she be sitting
1875
1 in her office doing paperwork or would she
2 be doing something else?
3 A Most of the time, when I saw her, she was
4 out with the patients.
5 Q And what do you mean, out with the patients?
6 A Out at their chairside or bedside, whatever
7 the case. She was not in the office.
8 Q How many people -- how many patients
9 approximately were there on the first floor
10 of Building 16 to your observation?
11 MR. WAGNER: Your Honor, may we
12 have a time?
13 THE COURT: Fix a time.
14 MR. CROSS: I'm --
15 THE COURT: Talking about the late
16 '70s?
17 MR. CROSS: I am, Your Honor. I'm
18 talking about the entire time from 1973 to
19 1977 when she was in there every day and
20 then those frequent occasions from 1977
21 until her retirement when she would have
22 occasion to take papers or whatever and go
23 there. I thought we established that
24 temporal reference.
25 A You asked the number of patients? I'm
1876
1 sorry.
2 Q Yes.
3 A You asked the number of patients?
4 Q On the first floor of Building 16.
5 A I can't tell you offhand. There probably
6 were probably 20 some.
7 Q Okay. And did you have an impression from
8 the number of, you know, from your daily
9 visits initially and then the regular visits
10 thereafter as to how many of those people
11 were smokers?
12 A I think probably the majority of them.
13 Q And did you have an opinion from that time

14 period as to how much of the staff would be
15 smoking?
16 A Probably over half of them.
17 Q All right. Did that include the nursing
18 assistants?
19 A Yes, it did.
20 Q Did that include any of the nurses
21 themselves?
22 A Yes, it did.
23 Q Did you smoke?
24 A No. Never.
25 Q Have you ever smoked?

1877

1 A No.
2 Q Did the doctors smoke?
3 A Yes, the doctors did.
4 Q Do you remember -- let me ask you this
5 question: I omitted to go into previously,
6 you mentioned that even though -- even some
7 of the post-stroke patients and some of the
8 paralyzed patients continued to smoke
9 despite their disabilities. How would they
10 get cigarettes, if you know?
11 A Somebody would have to give them to them.
12 Q And do you know how that was accomplished?
13 A Probably somebody from nursing service would
14 give it to them.
15 Q And did the nurses ever convey any orders or
16 requests for cigarettes in that regard?
17 A You mean as to the kind of cigarettes?
18 Q Yes.
19 A Yes.
20 Q And did you personally ever do that? Did
21 you convey a request for a particular brand?
22 A As the head nurse, I had to see that the
23 order was carried out, yes.
24 Q And do you have any specific memory as you
25 sit here today what brands had been

1878

1 requested during your time period?
2 MR. WAGNER: May we approach?
3 THE COURT: All right.
4 (Bench discussion)
5 THE COURT: All right. The
6 objection to the last question is sustained.
7 Go ahead, Mr. Cross.
8 MR. CROSS: Thank you, Your Honor.
9 Q After you retired, I believe you stated in
10 1985 you continued to do volunteer work
11 through your War Mothers program?
12 A Yes, I still volunteer.
13 Q What do you do as a volunteer now at the
14 Veteran's Hospital?
15 A We usually will have parties with them. The
16 type of parties might vary from month to
17 month.
18 Q And was that pretty -- was that fairly much
19 the case after 1985?
20 A Yes.
21 Q In other words, that's -- you have parties
22 now. Is that what you did in 1980, right
23 after your retirement?
24 A Yes.

25 Q How often does that take you to the 1879
1 Veteran's Administration Hospital?
2 A About every month.
3 Q Once a month?
4 A Uh-huh.
5 Q When did the conditions in the buildings
6 insofar as the amount smoked begin to
7 change?
8 MR. OHLEMEYER: Objection, Your
9 Honor, lack of foundation, specificity.
10 THE COURT: Make that a little more
11 specific, if you will.
12 Q All right. After you retired in 1985, you
13 continued to go out to the Veteran's
14 Hospital about once a month?
15 A Yes.
16 Q And did there come a time when you were
17 aware that conditions in the building in
18 terms of the amount of smoke that was in the
19 air began to change?
20 A After I retired, yes. Because now I
21 understand the buildings are all smoke free.
22 Q And when did that take place; do you know?
23 A After I retired, so I can't truthfully tell
24 you.
25 Q When you retired in 1985, did you have any 1880
1 knowledge as to any health risks associated
2 with secondhand smoke?
3 MR. OHLEMEYER: Objection, Your
4 Honor. Relevance, foundation.
5 MR. CROSS: Your Honor, I
6 established her educational background; she
7 was the person who, in fact, taught
8 continuing education in nursing at the
9 hospital, and she's certainly entitled to
10 know --
11 THE COURT: She can answer that.
12 You may answer.
13 A Would you repeat that again, please?
14 Q I would be more than happy to.
15 When you retired from the Veteran's
16 Hospital in 1985, did you have any personal
17 knowledge as to the health risks associated
18 with secondhand smoke?
19 A No, I was not aware of secondhand smoke as
20 such at that time and the hazards of it.
21 Q Did you ever have any conversation with
22 Mildred Wiley concerning the health risks
23 associated with secondhand smoke?
24 A No, not with secondhand smoking.
25 Q Did she ever make any statements to you on 1881
1 that subject?
2 A Not on secondhand smoking.
3 Q Did you ever receive any bulletins from the
4 Veteran's Administration concerning
5 secondhand smoke or its possible hazards?
6 A Never.
7 Q Did you ever receive any bulletins or any
8 information from any other source about
9 those problems?

10 A No.
11 Q Mrs. Hughes, I want to show you --
12 MR. CROSS: May I approach the
13 witness, Your Honor?
14 THE COURT: Sure.
15 Q I want to hand you a photocopy of what's
16 been admitted into evidence as Plaintiffs'
17 Exhibit 21-48.
18 MR. CROSS: That has been admitted,
19 has it not?
20 THE COURT: Yes.
21 MR. CROSS: Thank you.
22 Q And ask you if you are familiar with the
23 document such as that?
24 A Yes, I am.
25 Q Can you tell the jury what that is.

1882

1 A That shows the training she has had.
2 Q This is -- what is this document? What is
3 it a list of?
4 A The education and training that she
5 received.
6 Q Thank you. That's Mildred Wiley, it refers
7 to?
8 A Yes. Yes.
9 Q So this shows the number of -- this is a
10 three-page document, is it not?
11 A Yes.
12 Q And can you tell roughly the time period it
13 extends over?
14 A From 1975 to 1991.
15 Q To '91?
16 A Yes.
17 Q And these are a list of courses, are they
18 not?
19 A Yes.
20 Q Would you have conducted any of these
21 courses?
22 A Not in 1975, I don't believe.
23 Q Okay. But would you have conducted -- let's
24 see. There's 1975 through '77, there are a
25 few there. Would you have conducted any of

1883

1 those?
2 A Let me see. Yes, I probably had the reality
3 orientation.
4 THE COURT: Say that again.
5 A Reality orientation.
6 Q You are referring to --
7 A The reality orientation workshop.
8 Q -- the last item on page 3, April 29, 1975?
9 A Yes.
10 Q Realty orientation workshop?
11 A Yeah.
12 Q You would have conducted that course?
13 A Yes.
14 Q In any course that you conducted or was
15 given to you during your time at the
16 Veteran's Administration Hospital, was there
17 ever a mention or presentation made
18 concerning secondhand smoke?
19 A Never.
20 Q Do you today, as you sit here today, do you

21 have any physical problems as a result of
22 that secondhand smoke?
23 MR. OHLEMEYER: Objection, Your
24 Honor.
25 MR. WAGNER: Objection, Your Honor.

1884

1 THE COURT: I think I'll sustain
2 that, Counselor.
3 MR. CROSS: May I have a moment to
4 confer with my colleagues?
5 THE COURT: Yes, sir.
6 (A discussion was held off the record.)
7 MR. CROSS: Thank you, Your Honor.
8 MR. OHLEMEYER: Your Honor, I
9 object to any question of this fact witness
10 that begins with Mr. Cross writing this word
11 on the board.
12 MR. CROSS: May I speak?
13 MR. OHLEMEYER: If he wants to
14 speak, I'd like to speak in sidebar about
15 it.
16 THE COURT: All right. Come up.
17 (Bench discussion)
18 THE COURT: Go ahead, Mr. Cross.
19 MR. CROSS: Thank you, Your Honor.
20 We've used up a lot of paper so far.
21 Q Mrs. Hughes, can you see that?
22 A Yes, I can.
23 Q I've written a word on there, nitrosamine.
24 Let me ask you --
25 MR. WAGNER: Nitrosamines.

1885

1 MR. CROSS: Nitrosamines. Thank
2 you very much.
3 Q Are you familiar with that word?
4 A No, I am not.
5 Q Have you ever seen that word before today?
6 A No, I haven't.
7 Q I'm going to write another word and ask you
8 the same question.
9 MR. WAGNER: Your Honor, objection.
10 You can see where we're going to go.
11 MR. CROSS: One more.
12 THE COURT: One more? All right.
13 Q I've written the word benzo(a)pyrene on
14 there. Have you ever heard of that?
15 A Yes, I have.
16 Q What context have you heard of that?
17 A In connection with smoking.
18 Q Do all nurses take that pledge that you read
19 to the jury?
20 A The Florence Nightingale pledge, yes, we do.
21 Q And is it your understanding that that
22 pledge requires you to not do anything which
23 would harm a patient?
24 MR. WAGNER: Your Honor --
25 A That's right.

1886

1 MR. WAGNER: It seems to me it
2 speaks for itself. We don't need the
3 witness to interpret. The pledge speaks for
4 itself.
5 THE COURT: She read the pledge.

6 Sustained.
7 Q Now, you stated that you indeed follow that
8 pledge during your career.
9 A Yes, I do.
10 Q Based on your nursing education and your
11 overall knowledge during the time that you
12 worked at the Veteran's Administration
13 Hospital, in your professional opinion, did
14 you do anything at any time which was
15 harmful to a patient?
16 A Never, that I can recall.
17 Q With regard to the same issues, did you ever
18 observe -- did any of your colleague nurses,
19 did they live up to the pledge to the
20 best --
21 A I feel that they did.
22 MR. CROSS: Pass the witness, Your
23 Honor.
24 THE COURT: All right.
25 Mr. Ohlemeyer?

1887

1 MR. OHLEMEYER: I'm going to let
2 Mr. -- I've got a couple.
3 THE COURT: All right.
4 CROSS-EXAMINATION
5 BY MR. OHLEMEYER:
6 Q Good afternoon, Mrs. Hughes.
7 A Good afternoon.
8 Q My name is Bill Ohlemeyer. I just have a
9 few questions for you.
10 Am I correct that you retired in 1985?
11 A Yes, I did.
12 Q And before that, you were a nurse.
13 A Yes.
14 Q And for a time you were even a head nurse;
15 right?
16 A Yes.
17 Q And I hesitate to use the word, but is the
18 head nurse the boss of the nurses?
19 A I suppose you could use that terminology.
20 Q And is there a chain of command that --
21 A Yes.
22 Q How does that work, with the head nurse?
23 A The head nurse on the building is the
24 highest level. Then you have your staff
25 nurses, which are RNs and LPNs, which are

1888

1 licensed practical nurses and nursing
2 assistants.
3 Q And do the orders essentially come from the
4 head nurse, to the next level, to the next
5 level, to the next level?
6 A Yes. Yes.
7 Q And so who is it that tells the nursing
8 assistants what to do?
9 A Depending on who their team leader is.
10 Usually it's an RN.
11 Q And then would the head nurse tell the RNs
12 what to do --
13 A Yes.
14 Q -- if somebody needs to deal with the next
15 level of the chain of command?
16 A Above the head nurse, you mean?

17 Q Above the head nurse, who is the person who
18 deals with the people above the head nurse?
19 A We have an assistant chief nurse and
20 associate chief nurse. The associate chief
21 is in charge of the nursing education, and
22 the assistant would be in charge of all the
23 staff nurses.
24 Q So if the head nurse has a problem and needs
25 to deal with it, he or she talks to the --

1889

1 A There is an intermediate between those two.
2 There is a supervisor, area supervisor. I
3 left them out.
4 Q And by problem, I mean if there's something
5 that the head nurse needs from the hospital
6 that he or she doesn't have, there's a
7 procedure by which they can make that --
8 A She would go to her area supervisor, and it
9 would go to the assistant chief nurse, to
10 the chief nurse.
11 Q And, likewise, if there are problems that
12 the head nurse wants to bring to people's
13 attention, he or she does the same thing.
14 A Yes. Yes.
15 Q And in your experience, how would you
16 describe the relationship between the head
17 nurses and the higher ups at the VA?
18 A Hopefully they were good.
19 Q That's the goal, isn't it?
20 A Yeah.
21 Q And with respect to the directors of the
22 institution, as a head nurse, did you have
23 occasion to deal with the director of the
24 hospital on occasion?
25 A Yes, I did. I got a 25-year pin. Anytime

1890

1 we got a pin for years of service, we got it
2 from the director.
3 Q And we saw some exhibits this morning of
4 awards Mrs. Wiley got that were signed by
5 the director of the hospital.
6 A Yes.
7 Q Would you have occasion to deal with the
8 director of the hospital besides the times
9 when you were getting awards?
10 A Not directly, no.
11 Q You'd have to follow the chain of command?
12 A Yeah.
13 Q The safety committee that you told us about,
14 can you explain to us who was on the safety
15 committee?
16 A A member from various hospital departments.
17 Q And by various departments, what do you mean
18 by that?
19 A All right. That would include nursing,
20 medical staff, social workers,
21 psychologists, PM and R. That's physical
22 medicine, rehabilitation. There's so many.
23 But every department.
24 Q And how would you decide or how would they
25 decide who from those departments should be

1891

1 on that committee?

2 A I don't know how the other departments did
3 it, but our chief nurse selected the one in
4 nursing service.
5 Q And what was that committee supposed to do?
6 A We were concerned about any safety factors
7 within the hospital.
8 Q Now, am I correct that that was not the
9 committee that set policy for the hospital
10 with respect to smoking; isn't that right?
11 A If it were a problem that we were concerned
12 about, yes, it would include that, but they
13 were not the official smoking committee. Is
14 that what you're referring to?
15 Q Yes. There were rules and regulations about
16 smoking that came from the administration.
17 A When they decided to put the patients in
18 particular smoking areas, rather than
19 letting them smoke anywhere, I'm sure there
20 were policies that came out at that time.
21 Q And would those policies come from
22 Washington or would they come from Marion?
23 A We got both, if I remember correctly.
24 Q And when I say "come from Marion," I mean
25 there from the administrator of the

1892

1 hospital.
2 A Yes. Yes.
3 Q You also mentioned that one of the things
4 nurses did was to keep current, I think you
5 used those two words, keep current?
6 A Uh-huh.
7 Q Would you explain that for me.
8 A Tried to keep up on the current knowledge
9 that would be available to nursing at that
10 time.
11 Q And how would they do that?
12 A By reading journals and going to workshops
13 and this type of thing.
14 Q Would they get time off to go to those
15 workshops?
16 A Depended. Some we did and some we had to
17 use our own time off.
18 Q Do you know how often or what percentage of
19 the time nurses would use their own time or
20 time off to do that?
21 A I can only speak for myself. I went a few
22 times on my own, yes.
23 Q The exhibit that they gave you, 21-48, do
24 you still have that in front of you?
25 A No.

1893

1 Q Is there any -- remember, it's the list of
2 Mrs. Wiley's employee education and training
3 Mr. Cross asked you about?
4 A What's your question?
5 Q Well, do you remember what he showed you,
6 that list of courses?
7 A Yeah.
8 Q Is there any way to look at this list and
9 figure out how much of this Mrs. Wiley did
10 on her time as opposed to work time?
11 A I wouldn't have any idea.
12 Q As these types of lists go, is that a long

13 list?
14 A I would say so.
15 Q Most of your nurses didn't do this much --
16 A No.
17 Q -- training?
18 A No.
19 Q And one of the courses, it says here under
20 hours, some of these courses were eight
21 hours long; is that right?
22 A Yeah. Might be an all-day workshop.
23 Q And it looks to me like Mrs. Wiley was going
24 to four or five of these a year?
25 A That's very possible.

1894

1 Q And one of them says, JCAHQ, standards for
2 nursing care. Is that something to do with
3 the joint commission?
4 A Sure does.
5 Q Tell us what the joint commission is.
6 A It's a commission of several people that
7 comes in to inspect your hospital.
8 Q And do they do that on a regular basis at
9 your hospital?
10 A Yes.
11 Q Would they talk with staff and employees?
12 A Yes.
13 Q And would they do it in a way that was
14 anonymous, so the administration didn't know
15 who they were talking to?
16 A I think they used both secretive and
17 straightforward --
18 Q Okay.
19 A -- interviews.
20 Q And what was it they were reviewing or
21 looking for in general terms?
22 A They were trying to see where we need to
23 improve patient care.
24 MR. OHLEMEYER: Thank you,
25 Mrs. Hughes. That's all I have.

1895

1 THE COURT: Mr. Wagner.
2 MR. FURR: I just have a few.
3 THE COURT: Mr. Furr.
4 CROSS-EXAMINATION
5 BY MR. FURR:
6 Q Hi, Mrs. Hughes. My name is Jeff Furr. I
7 just have a very few questions. I believe
8 you said you were in nursing education
9 between 1962 and 1977; is that right?
10 A Yes. Yes.
11 Q And I think you said that you would have
12 been on 16A on every day that you had
13 students over on 16A; is that correct?
14 A That's right.
15 Q But you didn't have students on 16A every
16 day, did you?
17 A No. No.
18 Q How often would you have had students on
19 16A?
20 A It was not on a regular schedule. You never
21 knew when they were going to bring in a new
22 class.
23 Q Okay. Then you moved on to become a staff

24 nurse between 1977 and '85?

25 A Yes, I did.

1896

1 Q Where were you assigned when you were staff
2 nurse? I didn't get that from your direct
3 examination.

4 A Okay, I was on Building 1, Building 2,
5 Building 17, and Building 10 and 11.

6 Q Okay. So during -- between '77 and '85, you
7 were never assigned to Building 16; I take
8 it?

9 A No.

10 Q You retired in 1985.

11 A Yes.

12 Q So you would have retired before Mrs. Wiley
13 became a head nurse; is that right?

14 A I believe that's correct.

15 Q I think you said that you didn't like the
16 presence of the tobacco smoking in the
17 building when you were a nurse; right?

18 A That's correct.

19 Q Was that -- did you talk about that with
20 other nurses?

21 A Not particularly, no.

22 Q Have you ever talked to Mr. Cross before you
23 came up here and testified today? With the
24 lawyer that asked you questions, have you
25 ever met Mr. Cross before?

1897

1 A Not until today.

2 Q Had you ever met any of the lawyers for the
3 plaintiffs?

4 A Yes.

5 Q Who have you met?

6 A I met Mr. Howard.

7 Q Anyone else?

8 A And Mr. Young.

9 Q And Mr. Young?

10 A Uh-huh.

11 Q How did you meet them?

12 A I had a conference with them.

13 Q They came out to talk to you?

14 A Yes.

15 Q How many times did they come out to talk to
16 you?

17 A I believe Mr. Howard came three times, and
18 Mr. Young once or twice.

19 MR. FURR: Okay. Thanks a lot,
20 Mrs. Hughes.

21 THE COURT: Redirect, Mr. Cross?

22 MR. CROSS: Yes, Your Honor, very
23 briefly.

24 REDIRECT EXAMINATION

25 BY MR. CROSS:

1898

1 Q Let the record show it was a pleasure to
2 make Mrs. Hughes' acquaintance today.

3 You stated in response to a question
4 from Mr. Ohlemeyer that you kept current on
5 nursing and nursing things by reading
6 journals and going to workshops; correct?

7 A Yes. Yes.

8 Q Over what period of time did you read

9 journals and go to workshops?
10 A During the whole time I was employed, and I
11 still take the American Journal of Nursing.
12 Q You still do that today.
13 A Yes.
14 Q Up until the time you retired, do you ever
15 recall there being -- the subject of one of
16 those journals or one of those workshops
17 being secondhand smoke?
18 A There was never any.
19 Q Now, in response to a question from
20 Mr. Furr, you mentioned a number of other
21 buildings that you worked in as a staff
22 nurse following the termination of your
23 educational responsibilities.
24 A Yes.
25 Q In those buildings, was the smoke the same
1899
1 as, worse, or better than what they were in
2 Building 16?
3 MR. FURR: Objection, Your Honor,
4 this is repetitive. This was covered on
5 direct.
6 THE COURT: I think we've been
7 through this, Counselor.
8 MR. CROSS: All right.
9 THE COURT: I know we have.
10 Q And finally, Mrs. Hughes, you stated that
11 you would talk to other nurses about various
12 subjects towards the end of your career at
13 the VA Hospital.
14 A Yes.
15 Q And after reading these journals or going to
16 these workshops, would you discuss the
17 subject matter with the other nurses?
18 A Yes, I did.
19 Q And, finally, did you ever have any
20 conversations with any of these nurses about
21 the subject of secondhand smoke?
22 A No, I didn't.
23 MR. CROSS: No further questions.
24 Excuse me, Your Honor, one moment.
25 No further questions, Your Honor.
1900
1 THE COURT: Mr. Ohlemeyer.
2 MR. OHLEMEYER: Nothing, Your
3 Honor. Thank you, Mrs. Hughes.
4 MR. FURR: No further questions.
5 THE COURT: Thank you, ma'am, you
6 may step down.
7 Call your next.
8 MR. CROSS: Your Honor, the
9 plaintiffs will now call Rex Hughes. We
10 have to go get him.
11 THE COURT: Afternoon.
12 THE WITNESS: Afternoon, sir.
13 THE COURT: Raise your right hand,
14 please.
15 PLAINTIFFS' WITNESS, REX HUGHES, SWORN
16 DIRECT EXAMINATION
17 THE COURT: Have a seat right over
18 there, please.
19 Would you tell this jury your name.

20 THE WITNESS: Rex Hughes.
21 THE COURT: Spell your last.
22 THE WITNESS: H-U-G-H-E-S.
23 BY MR. CROSS:
24 Q What's your address, Mr. Hughes?
25 A [DELETED].

1901
1 Q How old a man are you?
2 A Pardon?
3 Q How old a man are you?
4 A 74.
5 Q Are you employed at this time?
6 A I have my own business. I'm a locksmith and
7 sharpener.
8 Q Now, who lives with you at that address?
9 A My wife, Betty.
10 Q And there was a Betty Hughes that just
11 testified, finished testifying in this cause
12 just a few minutes ago. Would that be the
13 same person?
14 A That is.
15 Q All right. How long have you been a
16 locksmith, Mr. Hughes?
17 A Since 1972. I've been in business since
18 '84.
19 Q And where is your locksmith business
20 located?
21 A I work out of my own home.
22 Q And what did you do before 1984?
23 A I was -- I worked at the Veteran's Hospital
24 at Marion, Indiana. The last ten years I
25 was there I was locksmith there, and before
1902
1 that I was a nursing assistant.
2 Q Okay. Let's go back to the beginning of
3 your employment at the Veteran's
4 Administration Hospital in Marion. What
5 year would you have first started to work
6 there?
7 A 1958.
8 Q And when you first took on employment at the
9 Veteran's Administration Hospital, in
10 Marion, what did you do for them?
11 A I was a nursing assistant.
12 Q And what exactly is a nursing assistant?
13 A Helped -- helped the nurses. I done a lot
14 of things to take care of nursing -- helping
15 to nurse patients: Bed baths, showers,
16 anything it took to help to take care of
17 them.
18 Q What kind of training did you have to become
19 a nurse's assistant?
20 A In the Army I was -- I done the same type of
21 work in the Army as what I had done -- as
22 that type of work there.
23 Q Same kind of work?
24 A Yes.
25 Q Is that where you learned how to do this, in
1903
1 the Army?
2 A Yes.
3 Q Would you tell the jury when you were in the
4 Army.

5 A I was in the Army from 1943 to 1946. During
6 World War II.

7 Q And where did you serve?

8 A Two years in the Pacific, I was on -- I
9 spent some time in the Hawaiian islands, but
10 I also went on down from there to Saipan.
11 Then from there back to Hawaiian islands,
12 from there back down to -- Iwo Jima,
13 Okinawa, into Japan and back home.

14 Q What was your rank?

15 A When I come out of the service, I was a
16 technician 4th grade, which is the same pay
17 grade as a sergeant.

18 Q And what is it you exactly did in the Army?

19 A I done -- I took care of the patients. They
20 came to me. I was in the admission area;
21 they came to me, and I saw them before the
22 doctors even saw them sometimes. They came
23 in right off the battlefield, right into the
24 hospital.

25 Q And did you receive any medals or awards
1904

1 during your -- for your Army service?

2 A I received them, but I didn't receive them
3 for many years later. During World War II
4 they did not give any medals. They gave us
5 ribbons. A few years back I applied for the
6 medals that I was supposed to have received,
7 and at that time they informed me that I had
8 received a Bronze Star.

9 Q What is a Bronze Star?

10 A It's a medal for, I guess, being in close
11 contact with the military in a place where
12 we were probably in danger.

13 Q The last question along this line,
14 Mr. Hughes, in all modesty -- rather your
15 modesty notwithstanding, the Bronze Star is
16 a pretty significant medal, significant
17 award; is it not?

18 A Yes, I think so. Yes. They made higher
19 ones, but it was not the lowest one.

20 Q It was up there, was it not?

21 A Yes.

22 Q Okay. So when you became nursing assistant,
23 how did you come to be a nursing assistant
24 at the Veteran's Administration Hospital in
25 1958?

1905

1 A Went there and applied for a job, and that's
2 where I got the job.

3 Q And were you assigned to a particular
4 building or a particular location or how did
5 that work?

6 A I was assigned to the medical ward. At that
7 time that was the only -- at that time we
8 did not have what you call nowadays
9 intensive care, and so we had -- we took
10 care of the very, very sick patients.

11 Q What buildings were you in during your time
12 as a nursing assistant?

13 A Started out on Building 25, went from there
14 to 124 and 15. From there I went -- was
15 assigned to Building 16.

16 Q So you are familiar with the building where
17 Mildred Wiley worked?

18 A I worked on the same building that she did,
19 yes.

20 Q Did you know Mrs. Wiley?

21 A Yes, I did.

22 Q How did you come to make her acquaintance?

23 A She was one of the nurses on the building
24 when I was there.

25 Q Now, did there come a time when you no
1906

1 longer worked at the hospital as a nurse's
2 assistant but, in fact, took on another
3 position?

4 A Yes. After I worked on Building 16, from
5 there I went to engineering, worked as a
6 carpenter, and my official title was
7 carpenter/locksmith. I done the
8 locksmithing there as long as it was
9 locksmithing to do. Whenever there wasn't
10 any locksmithing, then I done carpenter
11 work.

12 Q When did you retire from the VA?

13 A 1984.

14 Q So approximately how many years did you work
15 as a carpenter/locksmith?

16 A Ten years. I went over there in '74.

17 Q Okay. Now, when you were assigned to --
18 when you were assigned to a specific
19 building as a nurse's assistant, would you
20 get out and around to other buildings very
21 often?

22 A I went to every building on the entire
23 compound, which very few people out there
24 went to as many buildings as I did.

25 Q I was asking you, is this while you were a
1907

1 locksmith you were doing this? Or --

2 A Yes. Yes.

3 Q My question, Mr. Hughes, was when you were a
4 nurse's assistant and you were assigned to a
5 particular building, would you have occasion
6 to go to other buildings?

7 A Occasionally I was assigned for a few days,
8 one day or two at a time. One time -- a few
9 times I was assigned for a full month on
10 evenings or nights on a different building
11 than I was on.

12 Q But after you became a carpenter or a
13 locksmith, you got around.

14 A I was on every building out there.

15 Q Okay. And how often would you get to a
16 particular building? Say, let's -- with
17 specific reference to Building 16, when you
18 were a carpenter/locksmith, how frequently
19 would you get to that building?

20 A I would say probably at least a couple of
21 times every month. Sometimes more often
22 than that.

23 Q Now, when you worked at Building 16 as a
24 nurse's assistant, did you have occasion to
25 observe whether patients would be smoking?

1908

1 A Yes, at that time.
2 MR. OHLEMEYER: Excuse me, Your
3 Honor. The question calls for a yes or no.
4 THE COURT: I think you've answered
5 it, sir. He asked you whether or not you
6 saw that, and you said yes.
7 THE WITNESS: Yes.
8 Q I'm not sure the question contained this, so
9 let me cover this ground again.
10 Did you have occasion to observe
11 whether the patients would be smoking in
12 Building 16?
13 A Yes, they were.
14 MR. WAGNER: Excuse me. I don't
15 mean to interrupt, but I'm sure we don't
16 have a time frame here.
17 THE COURT: You're right. Fix a
18 time. You're talking about when he was a
19 carpenter/locksmith for the ten-year period?
20 MR. CROSS: No. I think the
21 question stated when he was a nurse's
22 assistant, assigned to Building 16.
23 MR. WAGNER: But I don't think we
24 have a date on that, Your Honor.
25 MR. CROSS: That was given in
1909
1 earlier testimony. I'll be glad to
2 establish that again.
3 THE COURT: When were you a nursing
4 assistant, what years?
5 THE WITNESS: From 1958 to 1974.
6 THE COURT: Thank you.
7 BY MR. CROSS:
8 Q And when did you work in Building 16,
9 Mr. Hughes, as a nurse's assistant?
10 A From 1971, 1971 to 1974.
11 Q Did you observe, was it the patients that
12 were smoking?
13 A Patients and personnel. The only
14 restriction was, they were not -- nobody was
15 allowed to smoke in the bedrooms, patients
16 or personnel.
17 Q And did you have occasion through your
18 observations to reach an opinion as to what
19 percentage of the patients would be smoking
20 in Building 16 during that time?
21 A It would be pretty high. I would say
22 probably 80 percent.
23 Q And did you have an opinion from the same
24 sources as to what percentage of personnel
25 would be smoking in Building 16?
1910
1 A I'm sure it would be over 50 percent.
2 Q And when you stated -- you used the word
3 "personnel," what did you mean by personnel?
4 A I didn't work in personnel.
5 Q No. You said personnel, patients and
6 personnel would be smoking. Who are the
7 personnel?
8 A Nurses and nursing assistants, doctors.
9 Q Are you familiar with the term "day room"?
10 A Yes, I am.
11 Q What is the day room?

12 A Day room is where the patients spend almost
13 all of their daylight time in one room where
14 all of them congregate, and they have access
15 to smoking in there, they have access to
16 sometimes some games and other things. They
17 spend their entire day in there.

18 Q Now, as a carpenter/locksmith, did you have
19 occasion to observe the ventilation that
20 existed in Building 16 after you became a
21 carpenter/locksmith?

22 A The ventilation was improved after I left
23 nursing service. They put in some
24 ventilation fans, some of the buildings
25 had -- I don't remember about 16, but

1911

1 several of the buildings had what they
2 called smoke eaters. I wondered how much
3 good they done.

4 Q Why did you wonder that?

5 MR. OHLEMEYER: Objection, Your
6 Honor. Lack of foundation.

7 THE COURT: Overruled. You can
8 answer.

9 A The smoke eaters, you could go into a
10 building that had the smoke eaters in, and
11 they had about as much smoke as the other
12 buildings.

13 Q Did you observe smoking in buildings other
14 than Building 16?

15 A I don't think there was any building out
16 there but what there was smoking in the
17 buildings.

18 Q Was that true in 1984 as well, when you
19 retired?

20 A Yes, it was.

21 Q Were there times -- were the ventilation
22 fans that you referred to, would they run
23 continuously?

24 A No, they did not. In the wintertime, they
25 sucked so much air -- heat out of the

1912

1 building that they weren't turned on very
2 much in the wintertime. They tried to run
3 them in the daytime during the summertime.

4 Q Did they have the windows open in the
5 summertime? I'm sorry, did they have the
6 windows open in the summertime?

7 A The windows had blocks in them so they could
8 only be opened, I think it was, five inches;
9 because the patients, there had been
10 patients crawl out through the windows and
11 commit suicide.

12 Q So when were the stops put in the windows so
13 that they could only be opened five inches,
14 if you recall?

15 A I'm not sure when it was. It was early
16 in -- after I had worked there just a short
17 time.

18 Q And were those stops still in the windows in
19 Building 16 when you retired?

20 A To the best of my knowledge, they were.

21 Q Thank you.

22 How is your health, Mr. Hughes?

23 MR. WAGNER: Objection.
24 Irrelevant, Your Honor.
25 THE COURT: Sustained.

1913

1 Q Did you ever have occasion to observe an
2 instance when some of the patients in the
3 hospital would be provided free cigarettes
4 from someplace?
5 A Yes. Many years out there, any patient that
6 did not have funds of their own, any
7 patient, if they did not have funds of their
8 own, they were provided free cigarettes.
9 Q Do you know who provided those cigarettes?
10 A I'm not completely sure. Different
11 organizations donated them. I have heard
12 that some of the tobacco companies.
13 THE COURT: Sir, we don't want you
14 to guess or speculate here. Just tell us
15 what you know.
16 Q Mr. Hughes, did you ever have occasion --
17 did you ever have occasion to observe what
18 brands of cigarettes would be provided to
19 these people free of charge?
20 MR. WAGNER: May we approach again,
21 Your Honor?
22 THE COURT: Same issue?
23 MR. WAGNER: Same issue.
24 THE COURT: Objection is sustained.
25 MR. WAGNER: Thank you, Your Honor.

1914

1 THE COURT: You don't have to
2 answer that last question, sir.
3 THE WITNESS: Thank you.
4 Q When you were in the military, were you
5 provided free cigarettes in World War II?
6 MR. WAGNER: Objection, Your Honor.
7 Relevancy.
8 MR. OHLEMEYER: Objection.
9 THE COURT: Sustained.
10 MR. MOTLEY: Your Honor, may we
11 approach the bench on that?
12 (Bench discussion)
13 THE COURT: The last objection is
14 overruled. Restate your question,
15 Mr. Cross. And it had to do with his
16 military service.
17 Q Mr. Hughes, you were, during the time that
18 you served in the Pacific theatre in World
19 War II, were you personally provided
20 cigarettes at no cost?
21 A Yes, I was.
22 Q And were you a smoker at that time?
23 A Yes, I was.
24 Q Did you subsequently quit smoking?
25 A Yes, I did.

1915

1 Q How did that come about?
2 MR. WAGNER: Your Honor, objection.
3 It's irrelevant as to the --
4 THE COURT: How he quit is
5 irrelevant. Sustained.
6 MR. CROSS: All right.
7 Q But you no longer smoke.

8 A I do not smoke, no, not now.
9 Q What quantity of cigarettes was provided to
10 you while you were in the military?
11 MR. WAGNER: Objection, Your Honor,
12 as to relevancy again. We're talking 1943,
13 1946, and it's this witness and not anything
14 connected with this case. I don't see the
15 relevancy of any of this.
16 THE COURT: That's a fair question.
17 You can tell us. Objection overruled.
18 Question was what quantity did they give
19 you.
20 A I know they gave -- I smoked a package of
21 cigarettes a day, and they gave that many.
22 and I think some of them smoked more than
23 that, and I think they were given more.
24 Q All right. And were you given just one
25 brand or different brands, several brands?

1916

1 MR. WAGNER: Your Honor, again, I
2 have to object, Your Honor. I can see where
3 this is going. It's going --
4 THE COURT: Well --
5 MR. WAGNER: It's going even
6 farther than we anticipated, Your Honor.
7 This is far beyond the bounds of being
8 relevant as to this man --
9 THE COURT: Sustained as to the
10 brands he was given.

11 MR. CROSS: One moment to confer,
12 Your Honor.

13 THE COURT: All right.
14 (A discussion was held off the record.)

15 Q Mr. Hughes, when you were working in the
16 carpentry/locksmith aspect of your
17 employment, drawing your attention to the
18 years 1974 to 1984, did you ever have any
19 involvement in cleaning the day room in
20 Building 16?
21 A In cleaning?
22 Q Yes, sir.
23 A No. No, sir.
24 Q Was there ever a time when there needed to
25 be any work done to the ceiling tiles in

1917

1 Building 16, in the day room?
2 A Yes. Yes, there was. Many times. The
3 ceilings were completely tan from the
4 cigarette smoke.
5 Q What needed to be done to those?
6 A They had to clean them with -- they tried
7 all kinds of different chemicals to clean
8 them with. They used -- I think the last --
9 the strongest thing that I know of that they
10 used was floor tile stripper.
11 Q Were you involved in that process?
12 A No, I was not involved in it. I saw it. I
13 saw them using it.
14 Q And who was using them?
15 A The housekeepers.

16 MR. CROSS: No further questions,
17 Your Honor. Pass the witness.

18 THE COURT: Mr. Ohlemeyer.

19 CROSS-EXAMINATION

20 BY MR. OHLEMEYER:

21 Q Good afternoon, Mr. Hughes. My name is Bill
22 Ohlemeyer.

23 A Good afternoon.

24 Q That process occurred before the ventilation
25 systems were in place; right?

1918

1 A This occurred even afterwards.

2 Q Am I correct that you were a carpenter --
3 let's back up. You were a nursing assistant
4 in Building 16.

5 A Yes, sir.

6 Q Or in other buildings?

7 A I was, the last that I -- the last that I
8 was a nursing assistant was in Building 16.

9 Q Okay. So when you switched from a nursing
10 assistant to a carpenter, your last
11 assignment was in Building 16?

12 A Yes.

13 Q How long had you been in Building 16?

14 A Approximately three years.

15 Q If the evidence in this case is that
16 Mrs. Wiley started working there in August
17 of 1973, then you were only there when she
18 was there for about a year; is that right?

19 A Something close to that, yes.

20 Q Do you recall whether -- did you work on her
21 team or with her group of nurses, or were
22 you in another part of the building?

23 A I was on her team.

24 Q And were you on 16A or 16B?

25 A 16B.

1919

1 Q B?

2 A Yes.

3 Q Do you know whether Mrs. Wiley was assigned
4 to 16A or 16B when she started at the VA?

5 A At that time, I'm sure she was on 16B.

6 Q Is that a fact that should be in her
7 employment record somewhere?

8 A I suppose it should be.

9 Q Have you ever seen your employment records
10 from the VA?

11 A I haven't seen it since I left there.

12 Q Does it describe where your assignment is
13 in --

14 A Yes.

15 Q So we could go to Mrs. Wiley's employment
16 records and figure out what her assignment
17 was at any point in time through those
18 records?

19 A I suppose. If you're looking, look for
20 mine, because it's been long enough that I
21 might have forgotten where I was at.

22 Q You worked at the VA for a long time?

23 A Yes. 27 years.

24 Q How many?

25 A 27 years.

1920

1 Q And some of those memories do kind of tend
2 to run together, don't they?

3 A Yes, they do.

4 Q Now, when you became a carpenter -- one more
5 question about the nursing assistant. Your
6 wife testified a few minutes ago and
7 described the fact that she was a head
8 nurse.

9 A Yes.

10 Q She also told us there was a chain of
11 command where the head nurses would direct
12 and supervise other nurses who would direct
13 and supervise the nursing assistants.

14 A Yes.

15 Q Is that pretty much the way it worked when
16 you were working?

17 A Yes, it is.

18 Q Did your wife ever direct or supervise your
19 work?

20 A No. That was -- she was in nursing
21 education, and I took some classes under
22 her. At that time we were not married.

23 Q So you became a carpenter in 1974 then.

24 A Yes.

25 Q And then from 1974 to 1984, you were in any
1921

1 number of buildings at the VA.

2 A I was in every building out there. We
3 changed -- during the time that I was
4 carpenter/locksmith, we changed every lock
5 on every building.

6 Q How many buildings are there?

7 A I'm not sure. There's an awful lot of them.
8 There's over a hundred.

9 Q A hundred different buildings?

10 A At that time. They weren't all patient
11 buildings. I went on a lot of buildings
12 that were not patient buildings.

13 Q What would those buildings have been?

14 A Some of them were maintenance buildings,
15 some just -- everything that they needed
16 buildings for out there.

17 Q And then you retired in 1984.

18 A Actually retired in '85. I was off for
19 several months on sick leave before I left.

20 MR. OHLEMEYER: That's all I have.
21 Thank you, Mr. Hughes.

22 THE COURT: Mr. Wagner, Mr. Furr.

23 MR. FURR: Just one, Your Honor.

24 CROSS EXAMINATION

25 BY MR. FURR:

1922

1 Q Hi, Mr. Hughes. My name is Jeff Furr.

2 A Hi.

3 Q I've got just one question for you. Who
4 made the decision not to turn those
5 ventilation fans on during the winter?

6 A I really don't know who made the final
7 decision on them. I do know that they were
8 turned off because they drew too much heat
9 out of the building.

10 Q That decision would have been made by
11 somebody at the VA Hospital, wouldn't it?

12 A Yes.

13 MR. FURR: Okay, thank you.

14 THE COURT: Redirect, Mr. Cross?

15 MR. CROSS: Very brief, Your Honor.
16 REDIRECT EXAMINATION
17 BY MR. CROSS:
18 Q Mr. Hughes, 16A and 16B are not different
19 buildings, are they?
20 A They're the same building. They were
21 under -- one was on the first floor, one was
22 second floor.
23 Q Isn't it the fact that the letter A or B
24 just designates the floor in Building 16?
25 A Yes.

1923

1 Q So there's a 16A, 16B, and 16C, but those
2 are just floors in Building 16?
3 A That's right.
4 Q And lastly, Mr. Hughes, after you were no
5 longer a building -- after you were no
6 longer a nursing assistant in Building 16,
7 in 1974, did you continue to have an
8 acquaintanceship with Mildred Wiley?
9 A Yes. Whenever I'd go in the building, I
10 would -- we were friendly. I always thought
11 she was a very nice person.
12 Q And, in fact, did you maintain that friend
13 relationship until the time of your
14 retirement ten years later?

15 MR. FURR: Objection, Your Honor.
16 This is beyond the scope of
17 cross-examination.

18 MR. CROSS: No, it isn't, Your
19 Honor. They went into the fact that they
20 left; he only knew her for a year.

21 THE COURT: All right. You can
22 answer the last. The question was, did you
23 know her after your retirement.

24 MR. CROSS: No.
25 A Not after my retirement, no.

1924

1 Q But you did know her from the time that you
2 left Building 16 in 1974 up and to the time
3 of your retirement?

4 A Yes, I did.

5 Q And did you --

6 MR. CROSS: That's all. Thank you.

7 THE COURT: Mr. Ohlemeyer.

8 MR. OHLEMEYER: Nothing further,
9 Your Honor.

10 THE COURT: Mr. Furr.

11 MR. FURR: No, sir.

12 THE COURT: Thank you very much.
13 You may leave the stand. Do we need ten
14 minutes?

15 (Standard admonition)

16 (A brief recess was taken.)

17 MR. CASSELL: All rise.

18 THE COURT: Be seated. Now, that
19 you are all comfortable, ladies and
20 gentlemen, let me tell you where we are this
21 evening. There are some matters of
22 documentary evidence, documents and things
23 of that nature, that we're going to deal
24 with at this point. Rather than bring you
25 in for five minutes, take you out for ten

1 minutes, bring you in for five minutes,
2 we're going to dismiss you at this point.
3 We're going to start tomorrow morning again
4 as 8:30. The reason I brought you in, I
5 want to remind you, leave your notes in the
6 jury room, do not talk among yourself about
7 the case, do not read anything in the
8 newspaper about the case or listen to
9 anything on the radio or television. Keep
10 an open mind and above all, do not form or
11 express any opinions at all about this case.

12 We'll start tomorrow morning at 8:30,
13 and my plan is to go with the noon break, of
14 course, to around 5:30 tomorrow evening. So
15 under those instructions, I'll see you in
16 the morning. Good evening.

17 MR. CASSELL: All rise.

18 (Outside the presence of the jury)

19 THE COURT: All right. Be seated.
20 Jury is not now present, we're still on the
21 on the record. What does the plaintiff
22 intend to introduce in the way of
23 documentary evidence, Mr. Motley?

24 MR. MOTLEY: May it please the
25 Court. Would you like me to pass these up

1 one at a time or en mass?

2 THE COURT: Just hand them all up?
3 Do the defense, do you have a copy of all
4 these?

5 MR. OHLEMEYER: We do, Your Honor,
6 although I'm not sure which list we're
7 working from.

8 MR. MOTLEY: We gave them the
9 document, that list right there.

10 MR. OHLEMEYER: All right.

11 MR. MOTLEY: We tried to give them
12 the ones we want to try to get in, separated
13 out according to the day we want to do it.

14 THE COURT: All right.

15 MR. MOTLEY: Your Honor, these are
16 the first two, Your Honor. She's assembling
17 the rest. This is the Frank Statement. I
18 apologize for illegibility.

19 THE COURT: That's all right.

20 MR. MOTLEY: Judge, this is an
21 advertisement placed by all the defendants,
22 save Liggett, in January 1954, in 300 some
23 odd newspapers around the United States.

24 THE COURT: You're referring to the
25 Frank Statement 10245A?

1 MR. MOTLEY: Yes, Your Honor, I am.
2 And what we've given, Your Honor, I believe
3 are copies of the Frank Statement as it
4 occurred in the Muncie newspaper, which is
5 A, and in the Indianapolis, various
6 Indianapolis newspapers. Your Honor, I'll
7 be glad to -- this was placed in the Muncie
8 Star Monday, January 4, 1954.

9 MR. OHLEMEYER: I can shortcut some
10 of this, Your Honor. I have no objection to

11 this as long as we get a legible copy into
12 evidence.

13 THE COURT: It is a bad copy, I
14 agree.

15 MR. MOTLEY: Your Honor, what I
16 would like to do, if you don't mind, I'll
17 have this retyped. We can attach a retyped
18 version to the actual advertisement.

19 MR. OHLEMEYER: How about if I find
20 a clean copy of an actual advertisement.

21 THE COURT: Library can do a
22 photocopy, I think.

23 MR. MOTLEY: That's where we got
24 this, Judge.

25 THE COURT: Oh, it is.

1928

1 MR. MOTLEY: What I was suggesting
2 was, we put that into evidence but we, and
3 I'll make sure they agree that I've retyped
4 it correctly. Then we just type up like a
5 memo form.

6 THE COURT: We will do that unless
7 they find a better copy.

8 MR. OHLEMEYER: I can get a better
9 copy.

10 MR. WAGNER: Your Honor, the record
11 also ought to reflect when the reference to
12 all defenses was made. We're not talking
13 about non-manufacturing defendants.

14 MR. MOTLEY: This is -- goes
15 against the Council For Tobacco Research as
16 well as the manufacturers, excluding
17 Liggett.

18 MR. SHOCKLEY: Your Honor, when
19 it's published to the jury, we'd request a
20 limiting instruction as to the holding
21 company defendants, that's American Brands,
22 RJR Nabisco Holdings, Inc., and --

23 MR. WAGNER: Wait a minute.

24 MR. OHLEMEYER: We'll talk about
25 that.

1929

1 MR. SHOCKLEY: All right.

2 MR. MOTLEY: We offer it against
3 all the companies who are attached to or, in
4 fact, did do cigarette manufacturing,
5 including the holding company.

6 THE COURT: All right. You still
7 request a limiting instruction,
8 Mr. Shockley?

9 MR. SHOCKLEY: Could we be heard on
10 that at a later time, Your Honor?

11 THE COURT: Yes. 10245A and
12 there's no objection to 10245B either?
13 That's Indianapolis Star.

14 MR. OHLEMEYER: That's correct,
15 Your Honor.

16 THE COURT: All right. Those will
17 be admitted tomorrow. Actually I'll admit
18 them now. We'll advise the jury tomorrow.

19 (Plaintiffs' Exhibit(s) 10245A and
20 10245B received in evidence.)

21 THE COURT: All right. Go ahead,

22 Mr. Motley.
23 MR. MOTLEY: Your Honor, the next
24 one was 20926.
25 Your Honor, 20926 is offered against
1930
1 Brown & Williamson and BAT. It is a 1978
2 group research and development conference,
3 Your Honor.
4 Your Honor, the relevance of this is,
5 this document deals both with smoking and
6 health and secondhand smoking and health.
7 It contains an admission by the chief
8 scientist of BAT, Dr. S.J. Green, that the
9 issue of cigarette smoking and health which
10 continues to this day to be contested by
11 some of these defendants has long ceased to
12 be an area for scientific controversy, 20
13 years antedating this date. It was produced
14 by BATCO, in the state of Florida case, Your
15 Honor. It's clearly a corporate admission
16 against interest. We do not seek to enter
17 this document against other defendants --
18 THE COURT: Understand.
19 MR. MOTLEY: -- at this time. Now,
20 it may come a time when we lay a predicate
21 to offer this under 801(2)(d)(e), which is
22 admission of a co-conspirator. But at this
23 time we seek only to introduce against BAT
24 and Brown & Williamson.
25 I can go over some of the other areas
1931
1 in this document, Your Honor, which relate
2 to the relevance of it, but it clearly
3 involves the admission I just stated plus a
4 discussion of the dangers of secondhand
5 smoke.
6 THE COURT: Brown & Williamson wish
7 to be heard?
8 MR. OHLEMEYER: Your Honor, this is
9 a document apparently, according to Mr.
10 Motley, taken from the files of a company
11 known as British American Tobacco Company.
12 They're not a party to this case. There is
13 no evidence, no foundation as to who said
14 any of this. It is somebody's notes on a
15 research and development conference. It
16 contains hearsay described, some with
17 attribution, some without attribution, and
18 there's no evidence that this was
19 communicated to, agreed to, acted upon, by
20 any of the companies, including Brown &
21 Williamson, parties to this lawsuit.
22 MR. MOTLEY: Well, the last page
23 will show you who wrote it, Your Honor. It
24 says SJG, Sidney J. Green, the head of
25 research and development for the BAT group.
1932
1 Your Honor, under Rule 104, we'll
2 certainly connect up later the
3 interrelationship between BAT Company, Big
4 BAT, and Brown & Williamson, but that's the
5 question of admissibility, generally,
6 relevancy conditioned on fact, matters of

7 that sort. It's a chicken and egg
8 situation, Judge. As you know, if I don't
9 link up BATCO with Brown & Williamson and
10 BAT Industries, the document will be
11 stricken. But we have to start somewhere,
12 and I didn't choose to start the case with
13 getting into corporate intricacies and all
14 of that, we will, of course, and have listed
15 exhibits which will deal with that.

16 THE COURT: Mr. Reynolds, care to
17 be heard?

18 MR. REYNOLDS: Yes, I do, Your
19 Honor. Since the document is being admitted
20 against two named organizations, one of
21 those named organizations is not a defendant
22 to this lawsuit. Now, he can talk about Big
23 BAT, little BAT, bat caves and the rest of
24 it. The fact is he has not established that
25 they are not separate corporations. They

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1 are separate corporations. He knows that,
2 as do I, that Mr. Green is not an employee
3 of BAT Industries. He was an employee of
4 British American Tobacco Company. It is a
5 British American Tobacco Company document.
6 They could have sued British American
7 Tobacco Company had they chosen to do so.
8 They did not. And it's the chicken and the
9 egg in this case, I think the Court should
10 make him produce the egg, and then we'll
11 talk about the chicken, or BAT, if you
12 prefer.

13 MR. MOTLEY: Your Honor, we laid a
14 predicate with our conspiracy proffer, which
15 Your Honor had us spread these facts out in
16 that record, in part, and we've done that,
17 Your Honor. So we've laid -- we've made a
18 sufficient showing of a conditional
19 relevancy here, your Honor, for this
20 document to be admitted.

21 Again, if it comes a time where Your
22 Honor is satisfied that our theory of
23 impersonna jurisdiction and our theory of
24 liability is not satisfied, all of these
25 documents will be stricken, the ones that

1934

1 don't so support our claims.

2 MR. REYNOLDS: Your Honor, we have
3 a piece of paper; the piece of paper has
4 words on it. What they have to do is show
5 that the words on those pieces of paper, in
6 order to introduce it against the defendant
7 in this case, have to meet the rules for
8 evidence against the defendant. They have
9 not shown that BAT, or BATCO referred into
10 there is my client. We know, and they have
11 admitted for other purposes on the record,
12 that there are two such companies. And it
13 seems to me, particularly since I know and I
14 believe Mr. Motley knows that Mr. Green is
15 an employee of British American Tobacco
16 Company, not -- or was at that time, not a
17 defendant in this case, it seems incumbent

18 on this Court not to admit it at this time
19 against the defendant BAT Industries.
20 If, in fact, he can connect it up
21 later, let's see what he can do. Why let it
22 in against us now on some theory that maybe
23 he will connect it up later.

24 MR. MOTLEY: It's not some theory,
25 Your Honor. You've got a rule right here in
1935

1 your book of evidence that says this is
2 exactly how you proceed. Rule 104. In any
3 case, Judge, you can't prove every fact on
4 the first hour of the trial. That's the
5 reason you got a Rule 104.

6 And I stand in my place as an officer
7 of the Court, Counsel knows full well we
8 have an abundance of evidence here that
9 deals with the relationship between BATCO,
10 BAT Industries and Brown & Williamson; in
11 fact, we've got a live witness coming -- I
12 don't know when he's coming, but he's a
13 former vice president of Brown & Williamson
14 and has been deposed, Your Honor, and the
15 defendants know full well what his testimony
16 is about the interrelationship, who did the
17 research and how it was communicated one to
18 the other. So I recognize that I have to --
19 I have to link this up, but that's what Rule
20 104 is all about.

21 THE COURT: When will that
22 executive be here?

23 MR. MOTLEY: Well, Judge, he was
24 supposed to be here last week. We got
25 backed up. It's Dr. Jeffrey Wigand, former
1936

1 vice president. But, Judge, every document
2 that does not have a propounding witness,
3 okay. Some of these documents are 50 years
4 old, so we don't have a witness that can
5 form a 104 conditional relevancy predicate
6 for every document. Some of them are
7 ancient documents. Your Honor has already
8 let one BAT document into evidence in the
9 face of this same argument.

10 MR. REYNOLDS: No. Based upon your
11 statement that it was a British American
12 Tobacco Company document.

13 MR. MOTLEY: That's what this is.

14 MR. REYNOLDS: All right. Then why
15 is it being admitted against BAT Industries?

16 MR. MOTLEY: Because we have a
17 conspiracy theory of jurisdiction,
18 conspiracy theory of liability, and BAT
19 Industries is interrelated with BATCO and
20 Brown & Williamson, Your Honor, and the
21 document that you already let in is 18064.
22 You made the same argument there.

23 THE COURT: Mr. Ohlemeyer.

24 MR. OHLEMEYER: I share Mr.
25 Motley's frustration with proving

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1 evidentiary foundations in a case that
2 involves conduct that stretches out over

3 fifty years. As frustrating as it may be,
4 there still needs to be an evidentiary
5 foundation. Just because the document
6 exists and the words exist don't make it
7 admissible. If he has somebody he's going
8 to provide that evidentiary foundation, let
9 him bring that witness and we'll deal with
10 it at that point.

11 THE COURT: I agree. I'll deal
12 with that if and when the witness comes.
13 29026 will not be admitted at this point.
14 It may however revisit that issue after
15 Mr. Wigand testifies.

16 What's the next matter?

17 MR. MOTLEY: Your Honor, here's a
18 big stack, Judge. I hope those are
19 seriatim.

20 THE COURT: Thank you.

21 MR. MOTLEY: Your Honor, this
22 document was produced by Philip Morris.

23 MR. OHLEMEYER: Exhibit number,
24 please.

25 MR. MOTLEY: Sorry. 10813. It's
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1 more than 30 years old, purports an ancient
2 document, therefore by definition it's not
3 hearsay, produced from the files of a
4 defendant in this case, contains admissions
5 against the corporate interest of Philip
6 Morris, and against the corporate interests
7 of BAT.

8 THE COURT: Any objection to 10813,
9 Mr. Ohlemeyer?

10 MR. OHLEMEYER: Yes, Your Honor.
11 Foundation objections. There's no author or
12 letterhead shown. There's no discussion of
13 environmental tobacco smoke or nonsmokers,
14 and at this point there's no evidentiary
15 foundation to establish that any of this was
16 either acted upon, agreed to, or
17 communicated to Philip Morris, or at what
18 point in time the document even found its
19 way into the file. It appears from its face
20 not to be something that was created by
21 somebody at Philip Morris. And if Mr.
22 Motley is correct, that he obtained this
23 from Philip Morris, and I don't know that he
24 did; but for the sake of argument we can
25 assume he did, he still hasn't established

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1 that evidentiary foundation.

2 MR. MOTLEY: Your Honor, this a
3 report of a visit of two scientists who were
4 affiliated with British American Tobacco
5 Company, through the Tobacco Research
6 Council, they list everybody in the United
7 States who they visited, it's 34 years old,
8 it's not hearsay, it's admissible on its
9 face, 803. Under your rule 803-16,
10 statements of the document in existence 30
11 years or more, the authenticity of which is
12 established. He didn't object. He can't
13 stand up here as an officer of the Court and

14 deny that this is an authentic document
15 because they produced it from their own
16 files.

17 THE COURT: Mr. Reynolds, any
18 comment?

19 MR. REYNOLDS: Yes, Your Honor. I
20 would note again that he has indicated it's
21 British American Tobacco Company individuals
22 who are involved in this document, and
23 therefore it certainly should not be
24 admitted against BAT Industries on the basis
25 of the record as it stands.

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1 THE COURT: You're offering this
2 document as to whom, Counselor?

3 MR. MOTLEY: At this point, as to
4 Philip Morris.

5 THE COURT: Philip Morris only?

6 MR. MOTLEY: At this point.

7 MR. OHLEMEYER: Very briefly, Your
8 Honor. See, here's the foundation that's
9 lacking. Nobody can tell the Court when
10 this document was communicated to Philip
11 Morris. From all Mr. Motley knows, this
12 finds its way into somebody's file as a
13 result of a lawsuit like this. Nobody --
14 there's nothing in this document that says
15 we sent this to Philip Morris at any point
16 in time relevant to this lawsuit. They
17 adopted it, they acted on it, they agreed
18 with it, they disagreed with it, they argued
19 with us about it. I don't think there's
20 enough evidentiary foundation to admit this.

21 THE COURT: The objection to 10813
22 noted and overruled. However, the Court
23 will direct plaintiffs' counsel to provide
24 the Court tomorrow morning with a limiting
25 instruction, Counselor. Any time I admit

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1 these on a limited basis, I expect the
2 offering party to prepare a limiting
3 instruction that I'll read to the jury.

4 (Plaintiffs' Exhibit(s) 10813 received
5 in evidence.)

6 THE COURT: What's the next matter?

7 MR. MOTLEY: Your Honor, the next
8 is Exhibit 9448. This document was
9 authenticated in a case pending in Florida
10 that I handled called Conner vs. RJ Reynolds
11 Tobacco Company. They stipulated it was
12 authentic. It's obviously more than 30
13 years old. It's a survey of cancer research
14 with emphasis upon possible carcinogens from
15 tobacco.

16 Your Honor has already overruled the
17 defendants' argument that if it doesn't deal
18 specifically with environmental tobacco
19 smoke, that it's got nothing to do with this
20 case. You've let that evidence in already
21 here before, so I assume I don't need to
22 argue the relevancy of the hazardous nature
23 to a secondhand smoke case.

24 THE COURT: This is offered as to

25 whom, Counselor?

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1 MR. MOTLEY: At this point, Your
2 Honor, just RJ Reynolds.

3 THE COURT: Mr. Ohlemeyer?

4 MR. FURR: I'll handle that, Your
5 Honor.

6 THE COURT: Mr. Furr.

7 MR. FURR: It is just a survey of
8 publicly available scientific literature.
9 Your Honor, it contains multiple levels of
10 hearsay, but perhaps more importantly
11 there's really no relevance to this
12 document. There's no foundation that the
13 document was ever distributed to anyone. In
14 fact, the author of this document has been
15 deposed and has testified that he was a new
16 employee to the company, that the document
17 was created only to fill some downtime that
18 he had while his laboratory was shut down,
19 that he had no expertise in the area, that
20 he was merely writing down the conclusions
21 of others, that he had no ability to
22 evaluate the information for himself, and
23 that he's not even sure if the document was
24 ever distributed to anyone.

25 MR. MOTLEY: It doesn't matter,
1943

1 Your Honor.

2 THE COURT: Not even sure -- I
3 didn't hear the last.

4 MR. FURR: The document was ever
5 distributed to any other employee in the
6 company.

7 MR. MOTLEY: It's amazing that it
8 shows up here with a Bates stamp here that
9 says produced from RJ Reynolds from their
10 files. Now, if doesn't matter, Your Honor,
11 he's going -- these are all weight arguments
12 that he's making. They don't go to the
13 inherent admissibility of the document.

14 THE COURT: 9448 will be admitted
15 with a limiting instruction.

16 (Plaintiffs' Exhibit(s) 9448 received
17 in evidence.)

18 MR. MOTLEY: Again, Your Honor,
19 that's limiting to RJ Reynolds, if I
20 understand correctly.

21 THE COURT: Yes.

22 MR. MOTLEY: Your Honor, the next
23 one is Exhibit 14333, which is produced by
24 RJ Reynolds. This man was a senior research
25 scientist, this is no musings in the garden,
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1 if you will, as we just heard. This
2 document is a survey by a Ph.D. for RJ
3 Reynolds, 1962. It's more than 30 years
4 old. It's not hearsay; produced from their
5 files.

6 Your Honor, this document, I know of
7 four -- four instances where this document
8 has been admitted, that I personally have
9 argued it. It goes into a survey and it

10 makes this conclusion: The evidence to
11 indict cigarette smoking as a cause of
12 cancer is beyond reasonable doubt. It's a
13 clear and compelling admission by RJ
14 Reynolds, 36 years ago, that cigarette
15 smoke, the ingredients contained in their
16 cigarette smoke was a potent carcinogen to
17 human beings, a fact which they suppressed,
18 and you'll hear testimony tomorrow about
19 this document, in fact, being suppressed
20 from the Surgeon General of the United
21 States.

22 THE COURT: RJ Reynolds wish to be
23 heard?

24 MR. FURR: Well, first off, I think
25 that Mr. Motley at that time didn't

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1 correctly characterize the last document.
2 It wasn't mere musings of an employee that
3 had no responsibility for the document.
4 But, in fact, the actual conclusions came in
5 this document, Your Honor, found on pages 13
6 through 14, where Dr. Rodgman states, "It is
7 not my intention to suggest that this
8 company accept the cigarette smoke health
9 data at face value." So it's not an
10 admission.

11 MR. MOTLEY: That goes to the
12 weight, Judge.

13 THE COURT: I'm sure you can
14 highlight that to the jury. 14333 will be
15 admitted only as to RJR with a limiting
16 instruction.

17 (Plaintiffs' Exhibit(s) 14333 received
18 in evidence.)

19 MR. MOTLEY: The next one, Your
20 Honor, is No. 319. I think that's right.
21 Do you have 319, Your Honor?

22 THE COURT: Yes, sir.

23 MR. MOTLEY: Dated 1957. This was
24 produced by Brown & Williamson, Your Honor,
25 in the state of Florida litigation.

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1 THE COURT: Yes.

2 MR. MOTLEY: More than 30 years
3 old. Here's where they use -- your stamp
4 may have --

5 THE COURT: Top of this says
6 produced by B&W Chiles tobacco litigation,
7 B&W protected by Minnesota tobacco
8 litigation protective order.

9 MR. MOTLEY: Your Honor, this
10 document would have been produced by Brown &
11 Williamson in multiple litigations. That
12 just happens to be the one we chose to
13 present to Your Honor because it's clearer
14 than some of the others.

15 And the relevancy of this document is
16 obvious. The idea has arisen that there is
17 a causal relationship between Zephyr, which
18 was their code word for cancer, more than 30
19 years.

20 THE COURT: Do you have a better

21 copy of this?

22 MR. MOTLEY: Judge, I'll try to
23 find a better copy of it. May I see if
24 yours is worse than mine, because mine, I
25 can read fairly well. Can I approach?

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1 THE COURT: Certainly.

2 MR. MOTLEY: Judge, mine is better
3 than this.

4 THE COURT: All right. I would
5 hope. This is just offered as to Brown &
6 Williamson?

7 MR. MOTLEY: At this time, it's
8 merely -- it's offered against Brown &
9 Williamson and BAT.

10 MR. OHLEMEYER: Once again --

11 MR. REYNOLDS: Your Honor, that
12 document was written before such a thing as
13 BAT Industries.

14 MR. MOTLEY: Well, they inherited
15 it.

16 THE COURT: Brown & Williamson.

17 MR. OHLEMEYER: Your Honor, again
18 it's a British American Tobacco Company
19 document. There is absolutely no evidence
20 that it was communicated to Brown &
21 Williamson at any point in time, and there's
22 really not even much evidence as to who or
23 how it was prepared. I just don't see how
24 there's an evidentiary foundation to admit
25 this into evidence based on Mr. Motley's

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1 mere assertion that it was produced by Brown
2 & Williamson.

3 MR. MOTLEY: It's not my assertion,
4 your Honor, it's stamped. If you look in
5 the back, there's a card from the Brown &
6 Williamson library card catalog.

7 MR. OHLEMEYER: And the dates,
8 well, I'm not going to even try to read it,
9 Your Honor. The evidence --

10 MR. MOTLEY: Somebody read it.

11 MR. OHLEMEYER: Yeah, who? That's
12 the point.

13 MR. MOTLEY: Checked it out.

14 MR. OHLEMEYER: That's the point.
15 Who, when, why, that's the evidentiary
16 foundation.

17 MR. REYNOLDS: Your Honor, this is
18 another British American Tobacco Company
19 document. I commented the document was
20 generated before BAT Industries was even in
21 existence. This is not a probate court
22 case; we're not deciding who inherited what
23 from whom. We were a corporation that came
24 into existence in 1976. It cannot be
25 introduced against us.

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1 MR. MOTLEY: I'll tell you what
2 I'll do, for that one, Judge, since it's
3 produced by Brown & Williamson. I'll just
4 forego introducing it against BAT at this
5 particular moment.

6 THE COURT: Just offer it against
7 Brown & Williamson?
8 MR. MOTLEY: Yes, Your Honor, who
9 produced it.
10 THE COURT: I will tell you right
11 now that I will tentatively admit this. If
12 there is a better copy -- I am unable to
13 read this, but --
14 MR. MOTLEY: May I show you my
15 copy, Your Honor, and tell you this is
16 better?
17 THE COURT: Yes, please. With a
18 limiting instruction, Brown & Williamson
19 only. That's much better. All right, 319
20 will be admitted as to Brown & Williamson.
21 (Plaintiffs' Exhibit(s) 319 received in
22 evidence.)
23 THE COURT: Next is 1286.
24 MR. MOTLEY: Your Honor, this is a
25 document that's offered against Liggett
1950
1 only, produced by Liggett from their files.
2 It's more than -- it's 37 years old. It
3 says, "L&M, A Perspective Review. There are
4 biologically active materials present in
5 cigarette tobacco. These are cancer
6 causing, cancer promoting, poisonous,
7 stimulating, pleasurable and flavorful."
8 THE COURT: Liggett wish to be
9 heard?
10 MS. ESAKOFF: No objection.
11 THE COURT: Any other defendants
12 have an objection?
13 MR. OHLEMEYER: Absolutely, Your
14 Honor. Again --
15 THE COURT: It's only offered as to
16 Liggett now.
17 MR. MOTLEY: Well, we're going to
18 offer it against everybody.
19 MR. OHLEMEYER: Well, I still think
20 its prejudicial effect -- the probative
21 value of this document being offered against
22 Liggett is outweighed by the prejudicial
23 effect it is going to have on these other
24 companies, because Mr. Motley's entire
25 theory of this case is there's one grand
1951
1 conspiracy, and at some point he's going to
2 argue this all connects up. And I don't
3 think he's going to do that. And at this
4 point I think you're going to have to
5 connect it up before you admit this kind of
6 evidence.
7 MR. MOTLEY: I don't know what he
8 wants me to connect up, Your Honor. It's a
9 statement against interest. The defendant
10 who made the statement doesn't object. It's
11 only offered against that defendant at this
12 point in time.
13 THE COURT: Objection is noted and
14 overruled, Mr. Ohlemeyer, but 1286 will be
15 admitted to Liggett only, against Liggett
16 only.

17 (Plaintiffs' Exhibit(s) 1286 received
18 in evidence.)
19 MR. OHLEMEYER: May I ask a
20 question, Your Honor?
21 THE COURT: Yes, sir.
22 MR. OHLEMEYER: And I apologize.
23 I've got the wrong -- I haven't looked at it
24 carefully enough. I think at some point the
25 defendants in this case are entitled to know
1952
1 on the record whether there's a settlement
2 case against Mr. Motley's case and Liggett.
3 MR. MOTLEY: There is no settlement
4 in this case.
5 MR. OHLEMEYER: Where there is a --
6 MR. MOTLEY: I just made a
7 statement on the record. There is no
8 settlement with any party in this case.
9 MR. OHLEMEYER: Whether there is a
10 high-low agreement.
11 MR. MOTLEY: There is no high-low
12 agreement. There is nothing.
13 MR. OHLEMEYER: Well, Your Honor,
14 at some point perhaps Mr. Motley would let
15 me frame the appropriate questions, let me
16 ask the questions.
17 THE COURT: How about now?
18 MR. OHLEMEYER: And then we'll
19 get -- I'm not prepared to do that -- maybe
20 tomorrow before court, to make sure that
21 we've got the law in front of the Court on
22 this subject, because I think it's very odd
23 what's going on here with the Liggett
24 company.
25 They're a defendant in the lawsuit, yet
1953
1 Mr. Motley is calling their chief executive,
2 who is beyond the subpoena power of the
3 Court in this case, there are no objections
4 to the introduction of their documents, at
5 some point I think the Court can align
6 Liggett with the plaintiffs as opposed to
7 considering them a defendant, and that may
8 have an effect with how the evidence comes
9 in with respect to Liggett.
10 THE COURT: Thank you, Mr.
11 Ohlemeyer.
12 MR. MOTLEY: There is absolutely no
13 evidence in this record, Your Honor, there's
14 any settlement, any settlement discussions,
15 that anybody's made an offer. There isn't
16 any high-low, there's nothing. I'm standing
17 here as an officer of the Court telling you
18 that. Now, if he's got some evidence that
19 they paid me some money, I'd like to know.
20 My accountant would be enthused to hear
21 that.
22 THE COURT: All right. 4536.
23 MR. MOTLEY: Your Honor, this is a
24 document that at this time is offered only
25 against Philip Morris. I can go through all
1954
1 the people here who are, Dr. Wakeham, the

2 name of the recipient, Your Honor, was the
3 vice president of Philip Morris. It's more
4 than 30 years old, therefore it's not
5 hearsay and it does make reference to
6 benzo(a)pyrene. BAP.

7 THE COURT: All right. Philip
8 Morris wish to be heard?

9 MR. OHLEMEYER: Yes, they do, Your
10 Honor. Again, the mere fact that it comes
11 out of the file of a company doesn't
12 establish its evidentiary foundation or its
13 relevance. There's no foundation to
14 establish whether this was accurate, whether
15 it was inaccurate, whether it was agreed,
16 whether it was adopted by the company,
17 whether it was acted by the company. All it
18 is is a statement of one person about
19 somebody else's opinions, the opinion of one
20 person about another's opinion, and at that
21 point it is not yet relevant in this case.

22 THE COURT: All right. Objection
23 is noted, overruled. 4536 will be admitted
24 as to Philip Morris only.

25 (Plaintiffs' Exhibit(s) 4536 received
1955

1 in evidence.)

2 THE COURT: 3949, analysis.
3 Offered against whom, Mr. Motley?

4 MR. MOTLEY: Philip Morris at this
5 time.

6 THE COURT: And briefly what is
7 this and how is it relevant?

8 MR. MOTLEY: This is a document
9 discussing nitrosamines in mainstream and
10 sidestream smoke. It's a proposed paper.
11 It goes on page 2, Your Honor, and it talks
12 about the knowledge the corporation had that
13 they had volatile nitrosamines in smoke.

14 Then on page -- excuse me one second,
15 Your Honor. I see something here that I
16 want to make sure I know exactly what it is
17 before I say something. Judge, Your Honor,
18 you'll note that Bates No. 28204, some
19 handwritten notes, these Bates numbers, Your
20 Honor, are the Bates numbers of the
21 defendant, Philip Morris. Just so you know,
22 this is how they produced them from their
23 file, Your Honor. They paginated them; we
24 didn't. We seek to move the entire document
25 into evidence.

1956

1 THE COURT: Now, are you telling me
2 this is a paper that was presented or
3 proposed to be presented or --

4 MR. MOTLEY: It says to be
5 presented at the symposium, "Risk Assessment
6 of N-Nitroso Compounds for Human Health,"
7 Heidelberg, Germany, May 21 through the
8 23rd. You see at the top, Your Honor, the
9 name of Dr. Osdene. You'll recall that's
10 the gentleman we sought to ask questions
11 about; he took the Fifth Amendment.

12 THE COURT: This is only offered as

13 to Philip Morris?
14 MR. MOTLEY: Philip Morris at this
15 time, yes, sir.
16 THE COURT: Mr. Ohlemeyer?
17 MR. OHLEMEYER: Your Honor, there's
18 no foundation to establish the relevance of
19 this document. Its probative value is
20 outweighed by its prejudicial effect.
21 There's handwriting on this. It's a draft.
22 Nobody is going to tell the jury whether it
23 was actually presented, whether anybody
24 agreed with it, whether it's accurate,
25 whether it's good science, whether it's bad

1957

1 science. These are all the types of facts
2 that are necessary to establish a foundation
3 for its relevance. Otherwise, all it does
4 is confuse and mislead the jury, and I think
5 you could exclude it under Rule 403 if you
6 didn't; or if you found there was a
7 sufficient evidentiary foundation, you could
8 still exclude it under Rule 403.

9 MR. MOTLEY: A statement of a party
10 opponent, Your Honor, is -- I don't know
11 where he gets all this foundational business
12 from. It's produced from their files, from
13 their business records. It's a statement of
14 an employee in the course and conduct of his
15 employment. Then it's admissible, period.
16 It's not hearsay, and it doesn't need any
17 other foundation.

18 THE COURT: 3949 will be admitted
19 as to Philip Morris without the handwritten
20 items on the first page, so clean that up if
21 you would, Mr. Motley.

22 (Plaintiffs' Exhibit(s) 3949 received
23 in evidence.)

24 MR. MOTLEY: Yes, Your Honor.

25 MR. OHLEMEYER: Your Honor, so the
1958

1 record is clear, the basis of my objection,
2 it is my position that the fact that
3 something is admissible as an admission over
4 a hearsay objection doesn't make it in and
5 of itself relevant or does not satisfy the
6 plaintiffs' evidentiary foundation. You
7 still have to have a document that's
8 relevant, it still has to be probative.
9 Then you decide whether or if it's hearsay.

10 MR. MOTLEY: It's about
11 nitrosamines, Your Honor, which you already
12 heard a lot about.

13 THE COURT: All right. Plaintiffs'
14 1409.

15 MR. MOTLEY: Your Honor, 1409 is
16 sought to be admitted against all the
17 members of the Tobacco Institute. This is a
18 Tobacco Institute document produced by the
19 Tobacco Institute. Mr. Panzer is an
20 officer, Mr. Kornegay was the president of
21 the Tobacco Institute. The relevance of
22 this is that this demonstrates what their
23 strategy and the conspiracy was, which we're

24 alleging in this case, as you know. And
25 you'll see the strategy was brilliantly
1959

1 conceived and executed over the years
2 helping us win important battles. It has
3 always been a holding strategy, consisting
4 of creating doubt about the health charge
5 without actually denying it. And then they
6 go on about how they've used it, Your Honor.

7 MR. MOTLEY: This is the essence of
8 their strategy that began in 1954, in the
9 Muncie newspaper with the Frank Statement,
10 which we say is a frank lie.

11 THE COURT: Mr. Ohlemeyer.

12 MR. OHLEMEYER: Your Honor --

13 MR. MOTLEY: Also, if I might, I'm
14 sorry, Bill, there's one other piece of
15 relevance, since they raised this common
16 knowledge business, you know, they claim
17 that common knowledge is a defense. If you
18 look at pagination number 21101, it goes to
19 the issue of common knowledge.

20 MR. OHLEMEYER: It's not on
21 anybody's letterhead, Your Honor. It talks
22 about a proposal. We don't know who
23 Mr. Panzer is and whether Mr. Kornegay
24 agrees with him, disagrees with him, thinks
25 it's an accurate statement or inaccurate

1960

1 statement. Before any of this can have any
2 probative value in this case, before it can
3 do anything but confuse and mislead the
4 jury, Mr. Motley needs to establish some
5 foundation. It doesn't exist for this
6 document.

7 THE COURT: How do we know who
8 Mr. Panzer is?

9 MR. MOTLEY: Well, Mr. Panzer is
10 the vice president of the Tobacco Institute,
11 Your Honor. I'll be delighted to take a day
12 off and go greet him with this document if
13 you'd like, but the fact of the matter is
14 they've admitted in answers to
15 interrogatories, Horace Kornegay is a former
16 Congressman from North Carolina who became
17 the president of the Tobacco Institute.

18 This document was produced by the
19 Tobacco Institute in the state of Florida
20 case, in the state of Mississippi case, from
21 their files. It was an admitted business
22 record. Maybe counsel doesn't know that,
23 but I can stand here and tell you they
24 produced it from their files, and I'm
25 telling you, Your Honor, as an officer of

1961

1 the Court, who Mr. Panzer and Mr. Kornegay
2 are. It has copies here to the vice
3 president on the back page, Mr. Kleopfer,
4 Your Honor.

5 MR. OHLEMEYER: Very briefly, Your
6 Honor, but what you don't know, and what I
7 don't know, is what evidentiary foundation,
8 if any, was required by these judges in

9 these other cases Mr. Motley keeps citing to
10 you and whether an appellate court would
11 agree or disagree with that. The point is,
12 in this case, on this record, there's an
13 insufficient foundation for the
14 admissibility of this document, and its
15 probative value is far outweighed by its
16 confusing and prejudicial effect.

17 MR. MOTLEY: I don't think you can
18 make a 403 argument, Your Honor, unless you
19 concede relevance, so obviously it's
20 relevant. Its probative value can't be
21 outweighed unless it's relevant. Again,
22 Judge, it recites, it goes back, it says, we
23 started this scam 50 or 20 years ago. That
24 takes us back to 1952. It's part of the
25 conspiracy. It's a statement against the

1962

1 interest of the members of the Tobacco
2 Institute.

3 Now, Your Honor, I don't know whether
4 Liggett was a member of the Tobacco
5 Institute in 1972. I'll have to let you
6 know that in the morning. They were in and
7 out. But I offer it right now against
8 everybody, all the defendants, all the
9 American defendants, Brown & Williamson,
10 American Tobacco Company, Philip Morris, RJ
11 Reynolds, Lorillard, and the Tobacco
12 Institute. And I will find out overnight
13 whether Liggett was a member at the time
14 that this document was generated.

15 THE COURT: As with the other
16 document, if there is evidence as to
17 Mr. Panzer's employ, then I perhaps will
18 order it admitted, but at this point I will
19 not.

20 MR. OHLEMEYER: Your Honor, just so
21 we're clear, I don't think there's a dispute
22 about Mr. Panzer's employ. My objection is
23 whether his opinion is shared by anyone,
24 adopted by his employer, or communicated to
25 any of the defendants in this case.

1963

1 THE COURT: I misunderstood you,
2 Counselor.

3 MR. OHLEMEYER: I'm sorry, because
4 I don't want you to be misled. There's not
5 much of a question about who Mr. Panzer is,
6 which is why Mr. Motley or any lawyer
7 preparing this case could have taken
8 documents like this and gone out and
9 established that foundation. They could
10 have taken those depositions, they could
11 have asked those questions.

12 MR. MOTLEY: Judge, we'd be trying
13 this case in the year 2019 if I took the
14 deposition of everybody who has written a
15 culpatory document.

16 THE COURT: With that comment of
17 Mr. Ohlemeyer, 1409 will be admitted then
18 with that limiting instruction, as to whom
19 it is offered against.

20 (Plaintiffs' Exhibit(s) 1409 received
21 in evidence.)
22 MR. SHOCKLEY: Your Honor, so that
23 I understand, and maybe this will be
24 clarified when they present the limiting
25 instruction in the morning, is the offer
1964
1 against those entities which were members of
2 the Tobacco Institute in 1972?
3 THE COURT: That was the
4 representation --
5 MR. SHOCKLEY: In 1972.
6 MR. MOTLEY: Correct.
7 THE COURT: Right.
8 MR. WAGNER: Judge, before we go to
9 the next document, could I just interject a
10 little something here, not specifically
11 directed to any of these particular
12 documents, but, you know, what's going on
13 here is that we are having documents
14 admitted without a sponsoring witness. And
15 all we're looking at here are the documents
16 and what is on the pages of these documents.
17 Mr. Motley is testifying about matters that
18 are not in this record; that they've been
19 admitted in other cases, that they've come
20 from this file or that file. And Your
21 Honor, that's not part of the record in this
22 case.
23 And in my experience, I mean, limited
24 as it is, I've always found that to be
25 improper. And I've been told by judges it's
1965
1 highly improper to refer to things outside
2 the record. And if Mr. Motley wants to be
3 sworn and be a witness in this case, then he
4 can be a witness, but he can't be an
5 attorney. But it just seems to me that what
6 we need to do is to judge the admissibility
7 of these documents by looking at the
8 documents and the face of the documents and
9 see if, A, they are authenticated; B, they
10 contain hearsay; C, if they pass the
11 authenticity test, and all the other tests
12 for admissibility on their face.
13 THE COURT: Thank you, Mr. Wagner.
14 That is what I am attempting to do here.
15 270.
16 MR. MOTLEY: Your Honor, 270 is
17 produced by Brown & Williamson. We offer it
18 at this time against Brown & Williamson
19 only. Your Honor, would you like for me
20 to --
21 THE COURT: What's the purpose of
22 it?
23 MR. MOTLEY: Yes, Your Honor. This
24 is another doubt and controversy document.
25 It says we can manufacture doubt and every
1966
1 day of the week. Then it talks about the
2 advertising code. Says our product, page 4,
3 "Our product has doubt, our message has
4 truth. Doubt is our product since it is the

5 best means of competing with the body of
6 fact that exists in the mind of the general
7 public. It is also the means of
8 establishing the controversy, within the
9 business we recognize a controversy exists."

10 Then it goes into matters about public
11 knowledge, Your Honor. And Your Honor, on
12 page 6, it lists its own cigarette products,
13 and we're going to be reading
14 interrogatories in, Your Honor, to link -- I
15 don't think they deny that these are their
16 products.

17 THE COURT: How do I know who
18 prepared this?

19 MR. MOTLEY: Your Honor, it was
20 produced by Brown & Williamson from their
21 corporate files as a business record. This
22 document, if you'll give me one second,
23 Judge, let me see if I've got a way of -- if
24 I have an indication in my notes here as
25 to -- if they fessed up as to who wrote it.

1967

1 Judge, why don't we withhold that, let
2 me see if I can answer your question
3 directly in the morning. I'll call my Brown
4 & Williamson expert.

5 THE COURT: 270, we'll withhold
6 that.

7 21747.

8 MR. MOTLEY: Your Honor, this
9 document was produced by British American
10 Tobacco Company. It's the minutes of a
11 meeting attended by Philip Morris. The
12 Council for the Tobacco Institute, Covington
13 and Berling, British American Tobacco
14 Company, and companies that have relations,
15 business relations, with other of the
16 defendants in this case.

17 It's signed by Dr. Sharon Boyse, it has
18 copies on the back to general counsel of
19 BAT, it shows copies to the members of the
20 Scientific Research Group of BAT. And I
21 believe, Your Honor, one of these gentlemen
22 is also a Big BAT employee, but I don't want
23 to say that as an officer of the Court. I
24 just see the name here; I recognize it; I'm
25 pretty sure that he is, but at this point in

1968

1 time we offer it against BAT and Brown &
2 Williamson.

3 THE COURT: Mr. Ohlemeyer.

4 MR. OHLEMEYER: Your Honor, this is
5 a document, as Mr. Motley said, from the
6 files of a non-party. Therefore, his
7 hearsay exception admissions doesn't quite
8 cover it. It is a summary of somebody's
9 impressions of a meeting that he or she
10 attended. It is replete with hearsay, and
11 coming from the files of a non-party with no
12 evidence that any of these opinions or
13 hearsay statements were shared by, adopted
14 by, or made by parties to this case. I
15 think it should be excluded.

16 MR. MOTLEY: Your Honor, it's
17 801(d), if it's nothing else. It's an
18 801(d)(2)(e) statement of one
19 co-conspirator, whether indicted or
20 unindicted, that's BATCO. Again, if we
21 don't connect up the relationship between
22 BATCO and BAT Industries, I'm sure Your
23 Honor will remove this document just like
24 you did the other documents.

25 THE COURT: Mr. Reynolds. I'm
1969

1 sorry.

2 MR. MOTLEY: I apologize. I was
3 only going to say, Your Honor, it
4 demonstrates the cigarette company exported
5 American lawyers to stir up controversy
6 about environmental tobacco smoke on page --
7 I think it's on the first page, Judge. Yes.

8 MR. REYNOLDS: Your Honor, it is a
9 British American Tobacco Company document
10 that he's indicated he's introducing it
11 against BAT. If by BAT he means British
12 American Tobacco Company, you can't
13 introduce it against them because they're
14 not a party in the lawsuit, and I don't
15 think there's any basis presently in the
16 record to allow introducing it against BAT
17 Industries.

18 MR. MOTLEY: Judge, this is just
19 like the other two documents. It's
20 conditional 104. We'll connect it up when
21 we read interrogatories and the like in the
22 case. But this is a document, Judge, which
23 goes straight to environmental tobacco smoke
24 issues and what they were trying to do, what
25 their whole strategy has been all along

1970

1 about the environmental tobacco smoke, which
2 is to create a controversy, when none
3 exists.

4 MR. REYNOLDS: The problem here is
5 who makes up the "they", and I'm simply
6 saying that one of the "they" that is not
7 made up by this particular document on the
8 record at this point is my client, BAT
9 Industries.

10 MR. MOTLEY: BAT Industries owns
11 and controls BATCO, Your Honor. That's what
12 the proof is going to be in this case.
13 We're going to prove that up; we're trying
14 to prove up liability right now.

15 THE COURT: I understand that,
16 Counselor, and Mr. Wagner's correct. Mr.
17 Motley is not testifying here. I'm not
18 basing it on his statements, but looking at
19 the document, I don't see how it can be
20 admitted against BAT Industries PLC. I will
21 admit it as to Brown & Williamson only at
22 this point with a limiting instruction.

23 (Plaintiffs' Exhibit(s) 21747 received
24 in evidence.)

25 MR. MOTLEY: How many more of these
1971

1 do you want to do today, Judge?

2 THE COURT: Let's go through your
3 list here. 9648.

4 MR. MOTLEY: 9648 is a Philip
5 Morris, produced by Philip Morris, page --
6 the first page of the document, Your Honor,
7 describes it is from Helmut Wakeham, vice
8 president of R&D of Philip Morris, to the
9 Chairman of the Board, Mr. Joseph Cullman,
10 III, December 8, 1970. This is a document
11 that goes to the heart of the conspiracy,
12 Judge. Look at paragraph 2. "It has been
13 stated that the Council For Tobacco Research
14 is a program to find out the truth about
15 smoking and health. What is truth to one is
16 false to another. CTR and the industry have
17 publicly and frequently denied what others
18 find is true. Let's face it, we are
19 interested in evidence which we believe
20 denies the allegation that cigarette smoking
21 causes disease."

22 Your Honor, it's very relevant. It
23 goes into the type of research that's being
24 funded by Philip Morris and the other
25 defendants. I only seek to admit it at this
1972

1 time against the defendant, Philip Morris.
2 If you look on the last page, Your Honor,
3 you'll see the various recipients are senior
4 officials, the Chairman of the Board of
5 Philip Morris, Dr. Osdene, who took the
6 Fifth Amendment when I tried to ask him
7 about this document.

8 Mr. Bowling was vice president for
9 public relations, Mr. Holtzman was general
10 counsel and vice president, Mr. Goldsmith
11 and Mr. Millhiser were senior executives.

12 THE COURT: Only offered as to
13 Philip Morris. Any comment from Philip
14 Morris?

15 MR. OHLEMEYER: Your Honor, first
16 paragraph ends with the statement, "I offer
17 the following summary, hastily adding that
18 these statements embody ideas from many
19 places."

20 That doesn't go to weight. This is
21 hearsay. There is -- this is hearsay within
22 hearsay. There are quotations all over
23 here. No one is going to testify who made
24 those statements. No one is going to
25 testify whether Mr. Cullman or the rest of

1973

1 the company agreed with any of the
2 statements.

3 It's nothing more than the statements
4 of one person who may or may not have
5 been -- regardless of what his title was, he
6 is repeating what others have said. And the
7 evidentiary foundation that makes any of
8 this probative is what the company did with
9 any of this, not what was written, not the
10 words that appear on a piece of paper that
11 can be found in a file.

12 MR. MOTLEY: Judge, that goes to
13 weight. That's nothing but weight. I might
14 be uncharitable to say a make weight
15 argument, but whatever form of weight it is,
16 it is solely dealing with weight. He
17 doesn't put any quotations marks, the vice
18 president of the company doesn't put any
19 quotations marks about this. He says, let's
20 face it, we're interested in evidence which
21 we believe denies the allegation that
22 cigarette smoking causes disease. Theirs no
23 quotes around that.

24 MR. OHLEMEYER: But, Your Honor,
25 Mr. Motley could find a foundation for this.

1974

1 He could look for a foundation for this. He
2 could present a foundation for this. What
3 he wants to do is to have you conditionally
4 admit these things, show them to the jury,
5 prejudice the jury, and then he doesn't
6 really much care if he connects it up or if
7 you strike this because at that point the
8 jury has seen it.

9 So the point of all this is, there
10 should be some order here. There is a
11 chicken and an egg, and the chicken ought to
12 come first and then we'll get to the eggs,
13 but at this point there's no foundation for
14 admissibility of this stuff.

15 THE COURT: Objection is noted and
16 overruled. 9648 will be admitted as to
17 Philip Morris only.

18 (Plaintiffs' Exhibit(s) 9648 received
19 in evidence.)

20 THE COURT: 10791.

21 MR. MOTLEY: Your Honor, this is a
22 document that is introduced against at this
23 time Lorillard only. This is the
24 handwritten notes of Mr. Curtis Judge,
25 president of -- later became president of

1975

1 Lorillard. The document goes to the, again
2 to the heart of the conspiracy, Your Honor.
3 Mr. Judge, in fact, has authenticated these
4 as his handwritten notes. This was produced
5 by Lorillard from their corporate files and
6 the document says, "We have abdicated
7 scientific research, discretionary,
8 directional management of the industry to
9 the lawyers, with virtually no involvement
10 on the part of the scientific or business
11 management side of the business."

12 Then they go into -- this is not the
13 first time this happened -- this is just
14 like it happened back in the '60s, when the
15 lawyers ran everything. There's a court in
16 Minnesota, I believe I handed you, Your
17 Honor, one of these orders in one of our
18 many legal arguments, the Court in Minnesota
19 found this document particularly damning
20 because it goes to the -- the Court found
21 and held, Your Honor, that the defendants
22 created the CTR as a shield or a front to,

23 and then let the lawyers run it and tried to
24 hide some of the research results behind
25 lawyer-client privilege, which you're going

1976

1 to be hearing a lot of as this trial goes
2 on.

3 MR. OHLEMEYER: Exactly, Your
4 Honor. I'd like to hear it. I'd like to
5 hear it from a witness who could be
6 cross-examined. I'd like to hear it from
7 somebody under oath. I'd like to have a
8 chance to produce evidence to the Court that
9 contradicts some of this evidence you keep
10 hearing from Mr. Motley.

11 There's no foundation to establish the
12 relevance of any of this. We don't know
13 whether these are Mr. Judge's words or the
14 words of others. We don't know whether he
15 agrees with them. We don't know if they're
16 statements that are being made and recorded.
17 We know when it was written, but we don't
18 know why or how or when. All of that is
19 evidentiary foundation that's necessary to
20 make it relevant to a case where the
21 plaintiffs' claim is a woman died as a
22 proximate cause of exposure to environmental
23 tobacco smoke in a hospital.

24 So I think there's a lack of foundation
25 for its admissibility, and I think its

1977

1 probative value is outweighed by its
2 confusing, time consuming, and prejudicial
3 effect.

4 MR. MOTLEY: Your Honor, 801(d)(2)
5 documents stand alone if they're relevant,
6 Your Honor. If they come from their files
7 and they've been authenticated, then they're
8 an admission against interest. They stand
9 alone; they need nothing else.

10 THE COURT: This is just offered to
11 Lorillard, be admitted to Lorillard only.

12 MR. MOTLEY: Yes, Your Honor.

13 THE COURT: 10788.

14 MR. MOTLEY: Your Honor, this is a
15 document produced by Philip Morris, from
16 their files, offered solely against Philip
17 Morris. It goes to document destruction.
18 Or spoliation. We're going to be seeking a
19 spoliation charge later in the trial.
20 Judge, which one -- I'm sorry, I'm on 10791.
21 Did you not get a copy of that?

22 THE COURT: I'm on 10788.

23 MR. MOTLEY: No, sir. 10791. Let
24 me -- we must have forgotten to give you a
25 copy. May I approach?

1978

1 THE COURT: Yes. Thank you. All
2 right. 9648 was offered as to Philip
3 Morris.

4 MR. MOTLEY: Which one, Your Honor?

5 THE COURT: 9648.

6 MR. MOTLEY: Yes, Your Honor.

7 THE COURT: Offered only as to

8 Philip Morris.
9 MR. MOTLEY: Yes, Your Honor. So
10 is this one. Again, I'm saying that at this
11 time, Your Honor, at a certain point in time
12 we're going to move to introduce all of
13 these as statements of co-conspirators but
14 not right now.
15 THE COURT: 10791, you indicated
16 was offered only as to Lorillard.
17 MR. MOTLEY: No, Your Honor. 10791
18 is Philip Morris. The prior document was
19 Lorillard. The handwritten notes was 19671.
20 The numbers are getting a little confusing,
21 I think. Judge, let me see if you've got --
22 this is the one you just asked me about,
23 against Lorillard. Yes, that's the one you
24 admitted against Lorillard.
25 THE COURT: I haven't held this
1979
1 yet. That's why I want to be clear.
2 MR. MOTLEY: No, not that one. We
3 haven't gotten to that one yet.
4 THE COURT: I know. I'm sorry.
5 10791, I'll hold it up here, is one
6 paragraph.
7 MR. MOTLEY: That's correct.
8 THE COURT: You indicated was
9 offered only as to Lorillard.
10 MR. MOTLEY: If I said that, I
11 misspoke.
12 THE COURT: I may have misheard
13 you. It's offered only as to Philip Morris?
14 MR. MOTLEY: Your Honor, you'll see
15 Dr. Osdene's name there again, and Dr. Dunn
16 was a senior researcher. His initials
17 appear on it. Carolyn Levy is a senior
18 researcher for Philip Morris. That's who
19 it's referring to.
20 THE COURT: It's offered only as to
21 Philip Morris, be admitted only as to Philip
22 Morris.
23 (Plaintiffs' Exhibit(s) 10791 received
24 in evidence.)
25 MR. OHLEMEYER: Over my objection,
1980
1 Your Honor?
2 THE COURT: Over the objection.
3 MR. MOTLEY: 10788 was the one you
4 just asked me about. 10788 are the
5 handwritten notes of Thomas Osdene. It's
6 offered solely against Philip Morris. This
7 is another document destruction piece of
8 evidence. Says, "Send the stuff to my house
9 and I'll act upon it and destroy it."
10 Again, this is another document we
11 asked Dr. Osdene about, he took the Fifth
12 Amendment.
13 MR. OHLEMEYER: Your Honor, if you
14 believe everything Mr. Motley told you,
15 you've heard that a witness invoked a
16 constitutional right, that he's allowed to
17 invoke, and you've learned that there is a
18 document here that talks about shipping

19 something, that deals with nothing we know
20 about in this lawsuit, to somebody's house.
21 There can't be any connection between this
22 document, and this lawsuit at this point in
23 the case. I object to it for lack of
24 foundation, and under Rule 403 its probative
25 value is far outweighed by its prejudicial,

1981

1 confusing and time-consuming effect.

2 MR. MOTLEY: It's not about
3 somebody someplace. It's about Dr. Thomas
4 Osdene, the senior researcher for Philip
5 Morris, who was attached to the legal
6 department. This is a document about
7 Cologne -- this was about research that was
8 created, excuse me, funded by a Philip
9 Morris in Europe. And this is a note
10 about -- that says, "Ship all documents to
11 Cologne by, keep in Cologne, okay to phone
12 and Telex. These will be destroyed."

13 MR. OHLEMEYER: But the point --
14 I'm sorry to interrupt.

15 MR. MOTLEY: No. 6, if letters have
16 to be sent, "Please send them to my house, I
17 will act on them and destroy. Advise
18 Rilander (phonetic)." Then you see the
19 word, Imbeefo (phonetic). Your Honor,
20 testimony will be in this case, I'm not
21 making a statement under 104, Imbeefo was a
22 European research facility owned and
23 operated by Philip Morris. Then its got
24 some names of scientists listed there.

25 MR. OHLEMEYER: Those words all
1982

1 appear there, Your Honor. So what? What do
2 they have to do with this case? Can Mr.
3 Motley tell you that anything that got
4 shipped to somebody's house didn't stay in
5 the file? Can he tell you that things that
6 got destroyed at home didn't get copied and
7 sent all over the world to other people. At
8 some point he needs a witness to establish
9 some of this foundation.

10 MR. MOTLEY: I've tried to take
11 their witnesses --

12 THE COURT: Let him finish.

13 MR. OHLEMEYER: You know, the fact
14 that he couldn't get a witness to say or
15 agree with everything he wants a witness to
16 agree to doesn't provide an exception under
17 the Rules of Evidence for him to just parade
18 all this stuff into evidence.

19 MR. MOTLEY: I misspoke on one
20 thing, on paragraph 6. I said confidential.
21 It says, "If important letters have to be
22 sent." This goes to the state of mind of
23 the corporation, Your Honor.

24 THE COURT: I agree with
25 Mr. Ohlemeyer. 10788 will not be admitted

1983

1 at this point.

2 21437.

3 MR. MOTLEY: This is offered

4 against the Tobacco Institute, Your Honor.
5 Only. Again, Mr. Kloepper was the name I
6 introduced to Your Honor earlier.
7 Mr. Knopick was a senior official of the
8 Tobacco Institute. It refers to -- it deals
9 with the addictive nature of cigarettes.

10 THE COURT: This is only offered as
11 to the Tobacco Institute, Inc.?

12 MR. MOTLEY: At this time, yes,
13 Your Honor.

14 THE COURT: All right.

15 MR. OHLEMEYER: The objection on
16 behalf of all defendants, Your Honor, is
17 that the subject of addiction is not a
18 subject at issue in this case. And it,
19 again, is hearsay within hearsay referring
20 to and repeating the remarks of third
21 parties or non-parties. And it's not really
22 dealing with the subject of addiction. It's
23 dealing with the definition of addiction
24 described by the National Institute of Drug
25 Abuse.

1984

1 MR. MOTLEY: Well, Your Honor, if
2 nothing else, it goes to notice that these
3 definitions are being discussed. And you've
4 already overruled his objection about
5 addiction, Your Honor.

6 MR. OHLEMEYER: One other more
7 important thing, Your Honor, is it talks
8 about warning labels and the National
9 Institute of Drug Abuse, wanting the word
10 "addictive" as to cigarette warning labels.
11 The law is very clear that since 1969, the
12 warnings that are on cigarette packages are
13 written by Congress, and that no claim can
14 be based upon a failure to include different
15 or differently worded language in those
16 warnings. So I think this deals with an
17 issue of a fact that is not relevant to the
18 lawsuit. It deals with a claim, a legal
19 claim, that is preempted by the supremacy
20 clause of the Constitution and the
21 preemptive effect of the labeling act as
22 interpreted by the Chipallone case, and it
23 always repeats hearsay of others that are
24 non-parties.

25 MR. MOTLEY: Your Honor, you've
1985

1 already ruled on this matter of preemption.
2 You ruled, in fact, it did not preempt
3 additional warnings on packages of
4 cigarettes themselves, and a big part of our
5 complaint here is that these defendants knew
6 that cigarette smoking was addictive and
7 didn't tell anybody.

8 THE COURT: 21437 will be admitted
9 as to the Tobacco Institute, Inc., only.

10 (Plaintiffs' Exhibit(s) 21437 received
11 in evidence.)

12 MR. MOTLEY: Your Honor, the next
13 one on my list is 24877.

14 THE COURT: Research Liaison

15 Committee.
16 MR. MOTLEY: Yes, Your Honor. The
17 Research Liaison Committee was a committee
18 that interfaced with, among other things,
19 the Council For Tobacco Research.

20 MR. SHOCKLEY: What was the number,
21 please?

22 MR. MOTLEY: 24877. At this time,
23 Your Honor, we simply offer it against the
24 Council For Tobacco Research. It was
25 produced -- actually, Your Honor, it was
1986

1 produced by Philip Morris, so we offer it
2 against CTR and Philip Morris. Produced by
3 Philip Morris from their files. The date of
4 it is 1976. The relevance of it is obvious,
5 Your Honor.

6 THE COURT: Mr. Ohlemeyer?

7 MR. OHLEMEYER: It contains hearsay
8 within hearsay, Your Honor. It is the
9 summary of comments made in a meeting, and I
10 don't think there's an evidentiary
11 foundation that's been established to allow
12 its admissibility in this case. Without
13 knowing who said what and whether anyone
14 agreed with it and how or why that connects
15 to the issues to be decided in this case, I
16 don't think you can establish its relevance.
17 So all it does is confuse, mislead the jury
18 and consume time.

19 MR. MOTLEY: I think it does a lot
20 more than that, Judge, obviously, or I
21 wouldn't be offering it.

22 THE COURT: 24877 will be admitted
23 as to CTR and Philip Morris.

24 (Plaintiffs' Exhibit(s) 24877 received
25 in evidence.)

1987

1 MR. MOTLEY: Your Honor, the next
2 document we seek to admit solely against
3 Brown & Williamson and if I believe I'm
4 correct, this is the last document that we
5 had given you for today. Your Honor, this
6 is a document --

7 THE COURT: 284 for the record.

8 MR. MOTLEY: Yes, sir. This is a
9 document which has been stipulated as
10 authentic by Brown & Williamson. This is a
11 memo from J. Kendrick Wells, III, to the
12 vice president and general counsel,
13 Mr. Ernest Pepples, regarding additives.

14 Your Honor, this is the first document
15 you will see, it makes reference to the
16 Committee of Counsel. The Committee of
17 Counsel is an organization that was referred
18 to in the Lorillard document that you
19 admitted as making all management and
20 directional decisions for the cigarette
21 industry. We only seek to admit it at this
22 time against Brown & Williamson, however,
23 since it came from their files.

24 THE COURT: Mr. Ohlemeyer?

25 MR. OHLEMEYER: Your Honor, this is

1988

1 a document that Brown & Williamson claims is
2 privileged. It even contains the word
3 "Privileged" on it. The only reason Mr.
4 Motley has it is because a paralegal from a
5 law firm employed by Brown & Williamson
6 stole it and published it. Brown &
7 Williamson has never voluntarily produced
8 this document. They claim privilege, it is
9 privileged and it should be -- the privilege
10 should be maintained.

11 There's no evidentiary foundation to
12 establish the relevance of the corporate
13 counsel's thinkpiece on the additives issue
14 to any issue in this case, and I think we
15 avoid a lot of mischief and a lot of
16 potential prejudice by excluding this kind
17 of stuff unless there's some way to connect
18 to the case or some way to overcome the
19 claim of privilege, none of which has been
20 established at this point.

21 THE COURT: What's the basis of the
22 privilege claim?

23 MR. OHLEMEYER: It's from the
24 corporate counsel to the president of the
25 company giving him a thinkpiece. It's

1989

1 opinion work product. It's a thinkpiece
2 from the corporate counsel to the president
3 of the company about a regulatory matter.

4 MR. MOTLEY: Your Honor, this
5 document is in the public domain. It's been
6 so ruled by six different courts, it's
7 either in the public domain or its evidence
8 of crime fraud. That's the reason why it
9 hasn't been adjudicated to be privileged.
10 This document discusses, Your Honor, on page
11 3 --

12 MR. OHLEMEYER: Your Honor, I
13 object. I don't mean to interrupt, but I
14 object to reading from a document --

15 THE COURT: I agree.

16 MR. MOTLEY: Judge, any person, you
17 could go home, if you were so inclined
18 tonight, Your Honor, you could turn on the
19 Internet, you and 250 other million
20 Americans can sit there in your living room
21 and enjoy reading this document.

22 This document, Your Honor, was part of
23 the basis of the Food and Drug
24 Administration's finding that the cigarette
25 companies had covered up from the government

1990

1 for 17 years information that was important.

2 It was the basis, Your Honor, of a
3 Congressional call for criminal
4 investigation of the defendants in this
5 case. In fact, such criminal investigation
6 is going on right now. Three grand juries
7 and, Your Honor, this case, this document is
8 published in the Journal of the American
9 Medical Association. It's in the
10 Congressional record. It's on the Internet.

11 The other judges, and I know this is
12 not binding, but just so Your Honor will
13 know, there's been findings that this
14 document, that it would be a perversion of
15 justice to allow every child in America and
16 everybody in America to see this document
17 but everybody has to decide the facts of
18 this case; that is the jury, because
19 everyone in America has got access to this
20 document.

21 It's in the library at the University
22 of California in San Francisco. As I said,
23 it's on the Internet. It's in the public
24 domain and, Your Honor, if you'd like us to
25 brief that issue and not address this issue

1991

1 with any witnesses tomorrow, I'll be glad to
2 do that. Because there is a lot of law in
3 Indiana on public domain, and I know Your
4 Honor wanted to defer these privilege issues
5 until trial and I think it probably would be
6 helpful if we were able to present Your
7 Honor with a discussion of why this document
8 does not remain privileged once it's in the
9 public domain. If I could have that, I
10 won't try to put it in tonight, give Your
11 Honor an opportunity to reflect on that
12 because it does raise some interesting
13 policy and legal questions.

14 THE COURT: Mr. Ohlemeyer.

15 MR. OHLEMEYER: Very briefly, Your
16 Honor. We aren't here to decide law and
17 policy. We're here to decide the case
18 that's been brought by the Wiley family.
19 Whether this is or isn't privileged doesn't
20 make it more or less relevant. It's not
21 relevant to the issues in this case.

22 THE COURT: You told me it was
23 privileged.

24 MR. OHLEMEYER: It is privileged.

25 THE COURT: He says the privilege

1992

1 has been waived.

2 MR. OHLEMEYER: I'm happy to brief
3 that for you. Because it's never been
4 voluntarily produced. Just because somebody
5 steals something and puts it on the
6 Internet, the rules of law, Rules of Civil
7 Procedure, don't say that in and of itself
8 makes it lose its privilege status.

9 THE COURT: I agree.

10 MR. OHLEMEYER: If it were that
11 easy, all you'd have to have people do is
12 run around and steal things. The point is,
13 regardless of the privilege issue, it's not
14 relevant.

15 MR. MOTLEY: I'll be happy to
16 address relevance. The man is talking about
17 destroying evidence on page 3. That's the
18 relevance of it. It says if we run tests on
19 these cigarettes --

20 MR. OHLEMEYER: Excuse me, Mr.
21 Motley. I've asked politely.

22 THE COURT: I don't want to read
23 from the document at this point.

24 MR. MOTLEY: Your Honor, may I say
25 this? In other words, we're going to brief
1993

1 this issue on the stolen issue, Your Honor.
2 Your Honor granted our motion; that's the
3 subject of an in limine ruling by you
4 already granting our motion.

5 THE COURT: I understand that.

6 MR. MOTLEY: I'll give you a brief
7 in the morning.

8 THE COURT: I'm going to take 284
9 under advisement until I see any comments
10 you'd like to make in brief form, two or
11 three pages, Counselor, on the privilege
12 issue. I'll take it under advisement until
13 tomorrow.

14 MR. MOTLEY: Yes, Your Honor.

15 THE COURT: Is that the extent of
16 the documentary evidence, Counselor?

17 MR. MOTLEY: Give me one second,
18 Your Honor.

19 THE COURT: At least for now?

20 MR. MOTLEY: Your Honor, have we
21 clarified the difference, I think we have,
22 between 10791 and 19671? You admitted both
23 of them, but since they were both
24 handwritten notes, I just want to make sure
25 the record was clear that there are two

1994
1 separate documents. One of them is 19671,
2 and the other is, what, 10791. The numbers
3 are similar and they're both handwritten
4 notes. And I will -- Your Honor, I didn't
5 want to mislead you and say that's all the
6 documents we're offering.

7 THE COURT: No, I understand.
8 10791 was admitted as to Philip Morris only.

9 MR. MOTLEY: And then 19671 against
10 Lorillard only. And I think that's where
11 the confusion came from, Your Honor. Both
12 of them are handwritten notes. We addressed
13 both of them in oral argument.

14 10791 is not a handwritten note. It's
15 this right here. Judge, we discussed both
16 of them. This is the one -- I think the
17 record is clear, but she thought maybe there
18 was some confusion.

19 THE COURT: I want to make sure it
20 is. I have 10791 admitted as to Philip
21 Morris. Now, what was the other one?

22 MR. MOTLEY: 19671. Have you
23 admitted this one?

24 THE COURT: I need to deal with
25 this one. This is 19671, under the date

1995
1 4/21/78, Scientific Research Liaison
2 Committee, handwritten notes. Appear to be.

3 MR. OHLEMEYER: You admitted that,
4 Judge, over our objections. These were the
5 notes that were described by Mr. Motley as
6 Curtis Judge's notes.

7 THE COURT: Well, if I did, I'm
8 going to deal with it again because I don't
9 see it in my notes nor does -- do you see
10 that?

11 19671, let's talk about it. Scientific
12 Research Liaison Committee, you're offering
13 it against whom, Counselor?

14 MR. MOTLEY: Your Honor, we did
15 discuss this. This is the one with Curtis
16 Judge. I indicated who it was. It was
17 Lorillard. It talks about abdicating the
18 research to the lawyers. Mr. Ohlemeyer and
19 I both remember arguing this one.

20 THE COURT: All right.

21 MR. OHLEMEYER: So we can
22 incorporate our arguments by reference.

23 THE COURT: You're offering it as
24 to Lorillard only. I had that down here,
25 and I have the wrong number on it. My

1996
1 confusion. 19671, admitted as to Lorillard
2 only.

3 (Plaintiffs' Exhibit(s) 19671 received
4 in evidence.)

5 MR. MOTLEY: Thank you, Your Honor.

6 THE COURT: I think that clears up
7 the documents for this evening. We talked
8 about Friday -- and I know it's late but
9 tomorrow what depositions do you intend to
10 offer, Mr. Motley?

11 MR. MOTLEY: Your Honor, I have a
12 fond hope that I will be able to get the
13 Colby, Frank Colby deposition, in a form
14 presentable to Your Honor to rule on the
15 objections. Dr. Colby was the senior
16 researcher of RJ Reynolds. And at this time
17 we would offer it only against RJ Reynolds,
18 the deposition.

19 The deposition was taken in the state
20 of Minnesota litigation, cross-noticed in a
21 class action in New York and cross-noticed
22 in the state of Texas litigation and both,
23 all -- we adopted the Minnesota direct.
24 They adopted the Minnesota -- excuse me, we
25 adopted the Minnesota cross. They, meaning

1997
1 RJ Reynolds, adopted the Minnesota direct by
2 Reynolds. And then I also did my own
3 cross-examination.

4 We've designated my cross-examination a
5 few pages from the Minnesota
6 cross-examination, and they've designated
7 the entire Minnesota direct examination.
8 It's a videotape deposition. You may recall
9 I mentioned to Your Honor that this was the
10 deposition of the gentleman who was from
11 Germany.

12 THE COURT: I recall that.

13 MR. MOTLEY: He has a very thick
14 accent. What we attempted to do here is
15 dub, what do you call it, subtitle it like
16 an old silent movie from the transcript with
17 the statements of the witness.

18 THE COURT: I read Reynolds'
19 objections this afternoon in my spare time.
20 Let me ask you, Mr. Motley, do you intend to
21 offer the entire deposition?
22 MR. MOTLEY: Your Honor, we
23 designated my cross, which is about 45
24 minutes. The deposition is three days long.
25 The answer to your question is no.

1998

1 THE COURT: Thank you.
2 MR. MOTLEY: The deposition is
3 three days long. My cross was about 45
4 minutes. I think the Minnesota cross that
5 we designated was, what, about 10 or 15
6 minutes because it puts them in a frame of
7 reference who the man is and what his
8 position was, and they designated about a
9 30-minute direct, so the whole deposition,
10 if you admit the whole -- if the deposition
11 is admitted as it is, it shouldn't be more
12 than two hours.
13 THE COURT: You intend to do that
14 tomorrow depending on the Court's ruling?
15 MR. MOTLEY: I really would like to
16 do that tomorrow, yes, sir.
17 THE COURT: Tomorrow afternoon?
18 MR. MOTLEY: Yes, sir.
19 THE COURT: Who will you begin with
20 tomorrow morning?
21 MR. MOTLEY: We have a lay witness
22 tomorrow. Who is it? A Nurse Beardsley and
23 then Dr. David Burns, former editor of
24 various Surgeon General reports.
25 THE COURT: All right.

1999

1 MR. MOTLEY: And there will be a
2 number of documents that you haven't ruled
3 on that we'll have to deal with before we
4 put Dr. Burns on unless we want to do it
5 with him on the stand, which I'm quite
6 prepared to do, whatever Your Honor wishes.
7 THE COURT: You indicated, or I
8 asked you last Friday to tell us, besides
9 the Colby deposition, what other depositions
10 do you intend to offer this week? Can you
11 tell me that at this point, in the next
12 couple days?
13 MR. MOTLEY: Yes, Your Honor. You
14 know we have the Fifth Amendment issue of
15 Dr. Osdene. We have Dr. Gary Huber, which
16 also -- we have made a motion in Texas to
17 have the Court communicate to you like he
18 did with the Mississippi court and the
19 Florida court saying it was okay to use the
20 deposition. In other words, the seal of the
21 deposition only existed until such time it
22 was, by looking at the order itself, only
23 until such time as it was offered in
24 evidence and then they overruled the
25 objections of the defendants to offering it

2000

1 into evidence.
2 It was not to be released, Your Honor,

3 to the press until it was offered, offered
4 at trial. That's why the Court ruled that
5 it could be used if the Court admitted it in
6 Florida and admitted it in Mississippi. It
7 could be used in those cases. Dr. Osdene's
8 attorney has told us, Your Honor, that if we
9 call him at any case, he would give me the
10 same answers, that is, take the Fifth.

11 I believe that that is, with the
12 exception of perhaps a few questions and
13 answers from Mr. Steven Goldstone, the CEO
14 of RJR Nabisco, and some 15 or 20 minutes
15 from the deposition of Dr. Spears, CEO of
16 Lorillard, the depositions I've mentioned,
17 Colby, Huber, Osdene, Spears, and Goldstone
18 are the only ones that we would offer this
19 week. And that's ambitious, if we get to
20 all them.

21 THE COURT: All right.

22 MR. OHLEMEYER: Can I ask a
23 question, Your Honor?

24 THE COURT: Yes.

25 MR. OHLEMEYER: My ill temper is
2001

1 explained in part because of the scheduling
2 difficulties that everybody encounters in
3 these cases. I just heard a lot that kind
4 of surprised me. Do I need a witness? I
5 mean, maybe it's not fair to ask Mr. Motley
6 whether I need a witness Tuesday. But --

7 MR. MOTLEY: Oh, no, you don't need
8 a witness Tuesday.

9 MR. OHLEMEYER: When does anybody
10 think I need a witness? Because once we get
11 into Wednesday, we're starting to push three
12 weeks on the plaintiffs' case.

13 MR. MOTLEY: Judge, you know, this
14 is, as you know, a very complicated case.
15 The defendants would have us, you know, take
16 these thousands of people's depositions.
17 Thankfully, Your Honor hasn't made us do
18 that. We're going as fast as we can
19 possibly be going. Your Honor has really
20 kept our nose to the grindstone. I think
21 everyone can attest to that. I can't
22 contemplate when we are going to rest. But
23 we've got a lot of witnesses. We've got the
24 three local doctors. They contest that
25 their cigarettes were at the hospital; we've

2002

1 got to prove that. We've got to prove the
2 conspiracy. We've got admissions against
3 interests of the various of the defendants.
4 I'm winnowing down the number of experts. I
5 won't be calling all the experts. I'm
6 certainly not going to read all the
7 depositions. As I've told you, we only want
8 to put four or five in this week. We
9 probably have excerpts at most from maybe
10 ten depositions when all is said and done.

11 THE COURT: When do you think the
12 local doctors will testify?

13 MR. MOTLEY: They tell me next

14 week. Early next week.
15 THE COURT: Early next week?
16 MR. MOTLEY: Yes, Your Honor.
17 MR. RILEY: Tuesday, Your Honor.
18 Tuesday or Wednesday.
19 THE COURT: Will the plaintiff go
20 all next week, you think?
21 MR. RILEY: Yes, sir.
22 MR. OHLEMEYER: It's hard for me to
23 imagine we're going to finish this case in
24 four weeks.
25 THE COURT: Well --

2003

1 MR. SHOCKLEY: Judge, just a
2 housekeeping matter. An attorney spoke and
3 interposed an objection on behalf of Liggett
4 earlier this afternoon, young lady in the
5 courtroom, I don't think she's identified
6 herself on the record. She certainly didn't
7 today, and I don't remember her having done
8 so previously when the other attorneys for
9 Liggett were here. I think it would be
10 appropriate if she did so.
11 THE COURT: Identify yourself on
12 the record.
13 MS. ESAKOFF: Yes. I'm sorry,
14 Sharon Esakoff.
15 THE COURT: Why don't you approach
16 the lectern.
17 MS. ESAKOFF: I'm sorry. My name
18 is Sharon Esakoff. I'm with Kasowitz,
19 Benson, Torres & Friedman in New York, and
20 I'm here on behalf of Liggett.
21 THE COURT: You have an appearance
22 in this case?
23 MS. ESAKOFF: Me personally?
24 THE COURT: You.
25 MS. ESAKOFF: An Indiana law firm

2004

1 applied for pro hoc vici admission for me.
2 THE COURT: That was granted as to
3 you?
4 MS. ESAKOFF: I believe so.
5 THE COURT: You believe so. Spell
6 your last name for the record.
7 MS. ESAKOFF: E-S-A-K-O-F-F.
8 THE COURT: Who was the Indiana law
9 firm?
10 MS. ESAKOFF: It's Mr. Riley. I
11 don't have the paper with me, I don't
12 remember the name exactly.
13 THE COURT: Mr. Riley?
14 MR. RILEY: Riley Bennett & Egloff,
15 Your Honor, not me. Riley Bennett & Egloff
16 was the name of the firm.
17 THE COURT: All right. Thank you.
18 MR. MOTLEY: Your Honor, one other
19 matter, housekeeping matter. Your Honor
20 ordered them to produce -- from my
21 understanding, I wasn't here this morning, I
22 apologize, couldn't take off because of the
23 weather. Not being here, my understanding
24 is you ordered the defendants to produce

25 documents this morning, but I don't know --
2005
1 my colleague tells me that they don't recall
2 whether you gave them a date by which they
3 should produce them.

4 THE COURT: You're talking about
5 the subpoena, Counselor?

6 MR. MOTLEY: Yes, Your Honor. I
7 don't believe we did talk about a time frame
8 on the response to the subpoena.

9 Those documents have already been
10 produced in one package in Minnesota, Your
11 Honor, so it shouldn't be all that great of
12 a burden to make a copy of what they've
13 already produced.

14 MR. OHLEMEYER: Your Honor, I've
15 not talked with anybody about that yet, but
16 obviously my advice is going to be as
17 quickly as possible. Or sooner. I mean, I
18 assume that's what the Court wants me to do.

19 THE COURT: That would be my
20 direction, Counselor. As soon as
21 practicable. Not over 48 hours from today.

22 MR. OHLEMEYER: Fine. Thank you.

23 THE COURT: Anything else,
24 Counselor?

25 MR. MOTLEY: No, Your Honor, I'm
2006

1 sorry.

2 THE COURT: That's all right. All
3 right. Have a good evening. Thank you.

4 (Proceedings were recessed at 6:15 p.m.
5 to be continued February 18, 1998 at 8:30
6 a.m.)
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